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It is settled by repeated decisions of the courts that a provision in a contract between a railroad corporation and the owner of goods received by it as a common carrier that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy, and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the State in which the question arises. But the reason on which those decisions are founded are that such a question is one of general mercantile law; that the liability of a common carrier is created by the common law, and not by contract; that to use due care and diligence in carrying goods intrusted to him is an essential duty of his employment which he cannot throw off; that a common carrier is under an obligation to the public to carry all goods offered to be carried, within the scope and capacity of the business which he has held himself out to the public as doing; and that, in making special contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms. It was further insisted by the plaintiffs, in the recent case of Hardford Fire Ins. Co. v. Chicago & St. Paul Ry., 20 S. C. Rep. 33, before the Supreme Court of the United States, that the same reasons apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the court regarded this view as too sweeping and held, in brief, that a stipulation in a lease of a strip of land on a railroad right of way for a storage warehouse, by which the railroad company is exempted from any liability for damage by fire from its locomotive engines, even though caused by the negligence of the company or its servants, is not void as against public policy, where the lease contains no provisions which in any way involve any relation of the railroad company as a common carrier to the lessee or to the public. This conclusion is not only in line with the authorities, but is eminently sound and just. No one had the right to put a warehouse upon the land of the railroad company without its consent, and the corporation was under no obligation to the public or to the lessee to permit the latter to do so. In granting and receiving the license to place and maintain a warehouse upon a strip of such land by the side of the railroad track, and in erecting the warehouse thereon, both parties knew that its proximity to the track must increase the risk of damages, whether by accident or by negligence, to the warehouse and its contents, by fire set by sparks from the locomotive engines, or by trains or cars running off the track. The principal consideration expressed in their contract for the license to build and maintain the warehouse on this strip of land was the stipulation exempting the railroad company from liability to the licensee for any such damages. And the public had no interest in the question which of the parties to the contract should be ultimately responsible for such damages to property placed on the land of the corporation by its consent only.

About eight years ago the legislature of Colorado made inquiry of the supreme court of that State as to the constitutionality of a proposed act making eight hours a legal day's work for all classes of mechanics, workingmen and laborers, "employed in any mine, factory or smelter of any kind whatsoever in the State of Colorado." The court replied that it was "not competent for the legislature to single out the mining, manufacturing and smelting industries of the State and impose upon them restrictions with reference to the hours of their employees from which other employees of labor are exempt." And it was further replied that the section "violates the right of parties to make their own contracts—a right guaranteed by our bill of rights." *In re* Eight Hour Bill, 21 Colo. 29, 39 Pac. Rep. 328. Disregarding these decisions it proceeded to enact a measure of the character mentioned, the excuse for such legislative defiance of the decision of the court being that after the decision was handed down a similar act of the legislature of a neighboring State (Utah), was approved by its highest court and sanctioned by the Supreme Court of the United States. The Colorado court has now,

however, reaffirmed its original decision, and in the case of *In re* Morgan, 58 Pac. Rep. 1071, wherein the validity of the act was challenged, held it to be unconstitutional as class legislation, and as violating the constitution guarantying to all persons the right of acquiring and possessing property. In a long and exhaustive opinion the court convincingly shows that the act is in plain defiance of constitutional rights, as declared in a long line of authorities. As to the decision of the Supreme Court of Utah and of the United States, upholding such legislation, it was declared by the Colorado court: First, that the decision of the Supreme Court of Utah in construing the Utah statute is not an authority, for the reason that the decision there was based entirely upon the mandatory nature of a provision of the Utah constitution which is not present in the organic act of Colorado; second, in affirming the judgment of the Utah court, the decision of the Supreme Court of the United States is not a precedent for the Colorado court in construing its act, for the reason that the sole question before the federal court was whether or not the Utah act violated the federal constitution. If, however, it could be maintained that this affirmance was in effect a determination that the Utah law was in harmony with the Utah constitution, the decision of the federal court would not be an authority in Colorado because that State has no such constitutional provision.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY—LABOR CLAIMS — LANDLORD'S LIEN FOR RENT.—*In re* Byrne, 97 Fed. Rep. 762, decided by the U. S. District Court, S. D., Iowa, E. D., it was held that where the laws of a State give a preference to the wages of employees, to the extent of $100 to each person, for labor performed within ninety days before the seizure of the employer's property on judicial process, or its sequestration in the hands of a receiver or trustee for the purpose of paying his debts, and the courts of the State hold that this preference or charge outranks any liens on the property created by contract, such a labor claim, to the amount of $100, will be entitled to priority of payment out of the estate of the employer in bankruptcy, in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on.

It was further held that a landlord to whom rent is due for the use of the premises by the bankrupt as a store will not be required to bring an action in a State court for the establishment of his lien, as provided by the State statute, as a precedent step to the assertion of his rights against the bankrupt's property in the hands of the trustee, but may at once prove his debt, and be heard in the court of bankruptcy in support of his claim to priority. The court said in part: "On behalf of Runyan it is contended that the trustee takes the property of the bankrupt subject to the liens and equities existing in favor of third parties, and that, therefore, the landlord's lien created by the statute of Iowa must be held to apply to the proceeds of the property in the hands of the trustee. Marshall v. Knox, 16 Wall. 561; Jerome v. McCarter, 94 U. S. 734. If the present contest was between the trustee, as the representative of the creditors at large, and Runyan, as the landlord of the bankrupt, the general rule contended for would be applicable; but the contest now before the court is between two creditors, who each make a special claim to the fund in the hands of the trustee, and as between these parties the trustee stands indifferent.

"On behalf of Byrne it is urged that Runyan cannot be heard to assert that he is entitled to a landlord's lien, because he did not institute an action for the establishment of his lien under the provisions of the State statute, but simply proved up his claim as a money debt in the bankruptcy proceedings. Under the express grant of jurisdiction at law and in equity conferred upon the districts courts in bankruptcy by the provisions of the second section of the Bankrupt Act, it cannot be questioned that in dealing with the questions that arise in the administration of bankrupt estates the court has the power to, and ordinarily will, exercise its equitable jurisdiction in order to be enabled to deal with the rights of parties upon the basis of the merits, rather than to be controlled by legal forms. No good reason exists for the adoption of the rule that in bankruptcy cases, when the property of the bankrupt has passed into the possession of the trustee, and under the control of the bankruptcy court, parties who may have or claim liens upon or equities in the property may not at once appear in the bankruptcy court and case, and there be heard on behalf of the claim they assert; and I, therefore, hold that Runyan was not required to bring an action in the State court for the establishment of his lien, as a precedent step to the assertion of his right against the property of the bankrupt or the proceeds in the hands of the trustee. The facts show that Runyan is entitled to a landlord's lien upon the stock of goods that passed into the hands of the trustee, and the question is whether Byrne is entitled to a preference in the order of payment.

"On behalf of Runyan it is contended that section 4019 of the Code of Iowa does not create in favor of Byrne a lien upon the funds in the hands

of the trustee. But is the contention well founded? In Bouvier's Law Dictionary a lien is defined to be 'a hold or claim which one has upon the property of another as a security for some debt or charge.' In Peck v. Jenness, 7 How. 612, it is said:

"'At common law there can be no lien without possession. It is there defined—a right in one man to retain that which is in his possession, belonging to another, till certain demands of him (the person in possession) are satisfied. Hammonds v. Barclay, 2 East, 235. In maritime law liens exist independently of possession, either actual or constructive. In courts of equity, the term "lien" is used as synonymous with a charge or incumbrance upon a thing where there is neither *jus in re*, nor *ad rem*, nor possession of the thing.'

"The Code of Iowa, sec. 4019, provides that:

"'When the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employees for labor performed within ninety days next preceding the seizure or transfer of such property, to an amount not exceeding $100 to each person, shall be a preferred debt and paid in full. * * *'

"In the case of Reynolds v. Black, 91 Iowa, 1, 58 N. W. Rep. 922, the question was presented to the supreme court of the State whether this section gave the employee a preference in the order of payment out of the proceeds of property upon which an express lien in the form of a mortgage rested when the property was taken under judicial process, and the conclusion reached was that the statutory preference created in favor of the employee gave him priority over the existing mortgage lien. It thus appears that, under the laws of this State, when an insolvent estate is being closed up through the medium of a receiver, trustee or assignee, the wages due employees, up to the amount of $100 to each person, for work done within ninety days next preceding the seizure by judicial process, or the transfer to the receiver, trustee or assignee of the property of the insolvent, will be given preference in order of payment over contract liens existing thereon; and the same preference must be given to wages due employees over liens created by statute, such as the landlord's lien claimed on behalf of Runyan.

"Can there be any question that section 4019 of the Code of Iowa, in cases wherein the property of an insolvent has passed into the possession of a receiver, trustee or assignee, creates in favor of employees a charge or incumbrance thereon which is given priority over other claimants? Can there be any question that under this section Byrne is entitled to the funds in the hands of the trustee, up to the amount of $100, as against the general creditors of the estate? Is it not, therefore, clear that Byrne has a charge, an incumbrance, in essence and in fact an equitable lien, upon the fund in question, which he is entitled to assert as against all parties except those who are able to show priority of right? In fact both Runyan and Byrne have a right to the fund in the hands of the trustee which is superior to that of the general creditors; the right in each case being created by the provisions of the statutes of Iowa, and of such a nature that in equity they constitute a lien upon the fund in the possession of the trustee. The question of the relative rank of their liens must be determined by the construction given to the statutes of Iowa which create the liens; and, as already pointed out, the Supreme Court of Iowa, in Reynolds v. Black, *supra*, has expressly held that the charge created in favor of employees by the provisions of section 4019 of the Code is superior and prior to mortgage and other like liens. Under the rule thus established by the State supreme court, it must be held that Byrne has the prior right to payment out of the fund in the hands of the trustee, and, as this was the conclusion reached by the referee, his ruling must be, and is, affirmed."

CRIMINAL LIBEL—PRIVILEGE.—In State v. Hoskins, 80 N. W. Rep. 1063, decided by the Supreme Court of Iowa in December, 1899, it was held that where a libel published concerning a candidate for judge is circulated outside the judicial district, it is not privileged, and, on a criminal prosecution, accused's belief in its truth affords him no protection. The court said in part: "In order to make plain our reasons for the conclusion at which we have arrived, it will be necessary to consider, to some extent, the common law relating to this subject. First, let us say there have always been some material distinctions preserved between civil actions, in which damages were sought for this offense, and criminal proceedings. In a criminal proceeding at common law the defenses were but two—a denial and a plea of privileged communication. The truth of the matter charged could not be given in evidence by a defendant. It was a maxim that 'the greater the truth the greater the libel.' A prosecution for this offense was founded on the thought that a publication of a libel was likely to provoke a breach of the peace, and the fact that it was true tended rather to increase the probabilities of such a result. 1 Kent, Comm. 621. But, in a private action for pecuniary recompense, the truth of the charge could always be shown in justification or in mitigation of damages, since, as it is said, a man is entitled to no better reputation than his actual character would warrant. 1 Greenl. Ev., sec. 421; J'Anson v. Stuart, 2 Smith, Lead. Cas. 986, note. In course of time, the rule was adopted in many of the States of the Union allowing the truth of the charge to be shown as a defense. In our own State this principle is embodied in the constitution. Art. 1, sec. 7. But with us it is qualified. The truth can be shown only when the

publication is made 'with good motives and for justifiable ends.' Except as thus modified, the common law relating to libel governs in this State. Without the constitutional provision mentioned, the truth itself would be no defense. There is no little uncertainty in the books on the question of what constitutes a privileged communication, or rather what publications are protected as such. There are cases which hold that a charge of crime made against one who is a candidate for public office may be the subject of privilege. Briggs v. Garrett, 111 Pa.St. 404, 2 Atl. Rep. 513. The contrary is held by many courts of high standing. See Bronson v. Bruce (Mich.), 26 N. W. Rep. 671, and cases cited. We need not determine between these conflicting authorities, for reasons which will presently appear. An absolute privilege is a complete defense. No legal complaint can be founded upon works spoken or written under its protection. Of this nature are proceedings in legislative assemblies, and generally in judicial tribunals. A qualified privilege is where the communication is made in the discharge of some duty, social, legal or moral. Such a defense may be rebutted by a showing of actual malice. To establish a qualified privilege, it must be shown that defendant believed the charge to be true, and published it in the discharge of some duty, and we may assume that it was a duty on his part to make known to the electors of the fourteenth judicial district the true character of a candidate for the office of district judge. But, if this duty was in any way transcended, the good faith of defendant ceased to be material. Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege. It appeared in this case, from defendant's own testimony, that he voluntarily published the charge, not only outside the fourteenth judicial district, but outside the State; thus making it known to persons who were in no way interested in the judicial election. We have been cited to no case, and know of no principle of law, that would sustain the claim of privilege under these circumstances. In Buckstaff v. Hicks (Wis.), 68 N. W. Rep. 403, on a state of facts quite similar to those here involved, the court said: 'The evidence showed that the newspaper in question circulated in adjoining counties and cities outside of the county of Winnebago, and outside of the plaintiff's senatorial district. To claim that there was any duty, public or private, resting on the defendant to publish such a charge against the plaintiff in these localities is to demonstrate the absurdity of the claim. There was not only no duty, but there was certainly no tangible interest in the subject-matter on the part of the people outside plaintiff's district. Thus, it is very plainly seen that the publication, even if it could be considered as privileged when made to a citizen of Oshkosh, who might be said to be interested in the subject-matter, could not be made broadcast to the world, and preserve its privileged character. The publication is excessive. It must be confined to people to whom defendant owes a duty to speak, or who have an interest with defendant in the subject-matter.' See, also, Rude v. Nass, 79 Wis. 321, 48 N. W. Rep. 555.

"We have, then, this question, somewhat narrower than discussed by appellant's counsel, presented: Where the publication of libelous matter is shielded by no privilege, can a defendant in a criminal proceeding exonerate himself by showing a belief on his part in the truth of the charge? We know of no authority in support of the affirmative of this proposition. In all the cases where evidence of the good faith of the defendant has been admitted, it was not as a direct defense, but only as tending to establish one essential element of a qualified privilege. Mott v. Dawson, 46 Iowa, 533; Bays v. Hunt, 60 Iowa, 251, 14 N. W. Rep. 785, and State v. Conable, 81 Iowa, 60, 46 N. W. Rep. 759, relied on by defendant, go no further than this. For the reasons stated, we think the evidence of defendant's good faith was inadmissible.

NUISANCE — NOTICE — ENCROACHMENT BY LESSEE.—It is held by the Supreme Court of Indiana, in City of Valparaiso v. Bogarth, that a house erected by defendant on premises leased to her, which encroaches on the street, is a public nuisance, and that where a public nuisance is created by the lessee, an action against her for its abatemnnt is maintainable without notice to remove or abate the nuisance. "It is settled in this State," says the court, "that a permanent structure like the one erected by appellee Stephens, which encroaches upon the street, is *per se* a public nuisance. State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117, and note, p. 127; Pettis v. Johnson 56 Ind. 139; Adams v. Car Co., 131 Ind. 375, 379, 31 N. E. Rep. 57; Sims v. City of Frankfort, 79 Ind. 446, 451; State v. Louisville, N. A. & C. Ry. Co., 86 Ind. 114, 116; Bybee v. State, 94 Ind. 443, 446, 447. See note to Drew v. Town of Geneva (Ind. Sup.), 42 L. R. A. 814, 825, 50 N. E. Rep. 871; note to Mayor, etc., v. Witmer (Md.) 39, L. R. A. 649, 685, 37 Atl. Rep. 965. It is settled that when a party creates, or is the author of a nuisance, an action may be maintained against him to abate the nuisance without any notice or request to remove the same. 1 Hil. Torts, 710; Ang. Water Courses, § 403; Wood, Nuis. (2d Ed.) § 838; Washb. Easem. (3d Ed.) 693-696; Enc. Pl. & Prac. 1110, 1111; 2 Jag. Torts, pp. 795-797; Steinke v. Bentley, 6 Ind. App. 663, 669, 34 N. E. Rep. 97; Curtice v. Thompson, 19 N. H. 471; Wason v. Sanborn, 44 N. H. 169; Eastman v. Manufacturing Co., 44 N. H. 143; Paper Co. v. Dean, 123 Mass. 269; Prentis v. Wood, 132 Mass. 488; Inhabitants of New Salem v. Eagle Mill Co., 138 Mass. 8; McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72, and note, p. 75; Plumber v. Harper, 3 N. H. 88, 14 Am. Dec. 333, and note, pp. 336, 341; Ray v. Sellers, 1 Duv. 254; Slight v. Gutzlaff, 35 Wis.

675; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Fish v. Dodge, 4 Denio, 306; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. Rep. 451; Branch v. Doane, 17 Conn. 418; note to Johnson v. Lewis, 33 Am. Dec. 407. It is held in many cases that the grantee or lessee of real estate upon which there is an existing nuisance of a nature not essentially unlawful is liable to an action therefor only after notice to remove or abate it. Slight v. Gutzlaff, 35 Wis. 476; Pierson v. Glean, 14 N. J. Law, 36, 25 Am. Dec. 497, and note, p. 499; Eastman v. Manufacturing Co., 44 N. H. 143; Plumer v. Harper, 3 N. H. 91, 14 Am. Dec. 333 341, and note, pp. 336-341; Woodman v. Tufts, 9 N. H. 88; McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72, and note, p. 75; Nichols v. City of Boston, 98 Mass. 43, 93 Am. Dec. 132, and note, p. 136; Paper Co. v. Dean, 123 Mass. 267, 269; Prentiss v. Wood, 132 Mass. 486, 488; Branch v. Doane, 17 Conn. 402, 418; Johnson v. Lewis, 13 Conn. 304; Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120, and note, p. 126; Blunt v. Aikin, 15 Wend. 523; Waggoner v. Jermaine, 3 Denio, 309, 45 Am. Dec. 474, and note, p. 479 ,Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Ahern v. Steele, 115 N. Y. 203, 210, 213, 22 N. E. Rep. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, and note, pp. 800, 801; Huckentine's Appeal, 70 Pa. St. 102; Thornton v. Smith, 11 Minn. 15 (Gil. 1); Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. Rep. 451, 8 Am. St. Rep. 656, and note, p. 661; Pierce v. Society, 72 Cal. 180, 13 Pac. Rep. 478; Grigsby v. Waterworks Co., 40 Cal. 396; Groff v. Ankenbrandt, 124 Ill. 51, 15 N. E. Rep. 40, 7 Am. St. Rep. 342, and note, p. 345; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91, and note, p. 94; Mayor, etc., of Georgetown v. Alexandria Canal Co., 12 Pet. 99, 9 L. Ed. 1012; Penruddock's Case, 5 Coke, 100; Westbourne v. Mordant, Cro. Eliz. 191; Some v. Barwish, Cro. Jac. 231; Brent v. Haddon, *Id.* 555. The rule requiring notice to the grantee or lessee in such cases has been seriously questioned in some cases, and denied in others. Caldwell v. Gale, 11 Mich. 77; Norton v. Volentine, 14 Vt. 239; Brown v. Railroad Co., 12 N. Y. 492; Hubbard v. Russell, 24 Barb. 404; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 52 Barb. 390; Banking Co. v. Ryerson, 27 N. J. Law, 457; note Plumer v. Harper, 14 Am. Dec. 340, 341; note to Pierson v. Glean, 25 Am. Dec. 499."

THE IMPOSSIBLE IN LAW AND FACT.

We will consider the questions involved in this article in the following order: 1. Definition. 2. Effect of Express Stipulations Against the Impossible in Fact. 3. Effect of Express Stipulations Against the Impossible in Law. 4. What will be Construed as, or the Equivalent of, Such Stipulations. 5. How, in the Absence of Such Stipulations, and Further Thereof.

1. *Definition.*—An impossible contract may be defined to be one which the law will not hold binding upon the parties, because of the natural or legal impossibility of the performance by one party of that which is the consideration of the promise of the other.

2. *Effect of Express Stipulations Against the Impossible in Fact.*—If a person promise to do a thing, which is in its own nature obviously impossible of performance, the other party cannot expect that it will be performed, nor base any action upon such an expectation; nor will the law aid him by compelling, or attempting to compel, the promisor to perform, or by imposing damages upon him for non-performance. If sued upon such promise, he may plead the impossibility as a defense; and, if he seeks to enforce the contract of the other party, the latter may avail himself of the same defense. And so, if the promise is to do that which the promisor lacks legal power to do. The impossibility of an effectual performance of such a promise by the maker is as obvious and as great as in the former case, and the promisee can have no better grounds for relying upon it. Therefore, it is beyond the power of courts to compel performance, and they will not in any manner recognize the promise as a binding obligation on his part; nor is there ordinarily any ground upon which they can enforce the contract of the other party. It is well settled that a mutual undertaking between parties to do what both know to be impossible is vain and idle, lacking in all the elements of a contract, and no suit can be maintained thereon.[1] However, a contract may be good in favor of one who entered into it in ignorance of the impossibility of fact.[2] In illustration of this principle, it may be said if a married man and a woman not knowing him to be married agree to intermarry, she may avail herself of the contract, and bring suit to recover damages for its breach immediately upon learning of the deception.[3] But if both

[1] Gilmer v. Gilmer, 42 Ala. 9.

[2] Quirk v. Thomas, 6 Mich. 76; Wright v. Crabbs, 78 Ind. 487; Hanauer v. Doane, 12 Wall. 342; Suit v. Woodhall, 113 Mass. 391. See Walker v. Tucker, 70 Ill. 527.

[3] Kelley v. Riley, 106 Mass. 339; Coover v. Davenport, 1 Heisk. (Tenn.) 368. See Pollock v. Sullivan, 53 Vt. 507.

of the parties are married, or only one is so, and the other is aware of it, the mutual promise is, as to both, void.[4] Again, suppose that while both parties believe a certain chattel to be in actual existence, one of them, whom both believed to be the owner, sells it to the other with the covenant that he has power and authority to sell it, then, if in fact it has already been destroyed, the purchaser has an action which he may maintain on the contract. But if both the parties knew the bargain to be a mere act of folly, it would be void. An impossibility which may arise or be disclosed after the making of the contract, no matter how its probability may be contemplated by the parties, is to be treated as unknown to both. Therefore, an agreement entered into between them, whereby one engages to pay the damages which the inevitable in the future may bring to the other, is held to be valid. The issuance of policies of marine insurance, whereby the underwriter agrees to compensate the owner in money for damages from "perils of the sea," against which no human power can successfully contend, is a familiar and apt illustration of this principle. Such contracts are entered into and their provisions enforced in our courts daily.[5] And the same may likewise be said of policies of fire, life, accident and various other kinds of insurance.

3. *Effect of Express Stipulations Against the Impossible in Law.*—All law is necessarily administered on the presumption which, except in special circumstances, is conclusive, that the law is known by every person who dwells or transacts business in the country where it prevails,[6] and the exceptions to this rule are principally such as have no relation to contracts. No agreement between parties to do a thing prohibited by law, or subversive of any public interest which the law cherishes, will be judicially enforced. Therefore, the law will not suffer the accomplishment by indirect means of what it forbids directly.[7] Any act which is forbidden either by the common or by the statute law—whether it is *malum in se* or *malum prohibitum*,[8] indictable,[9] or only subject to a penalty or forfeiture,[10] or however otherwise prohibited by a statute,[11] or the common law—cannot be the foundation of a valid contract, nor can anything auxiliary to or promotive of such act.[12] It is well settled, both in law and equity, that the meaning of contracts cannot vary with the tribunal. In illustration of this doctrine, particular cases may be said to be wages earned by a school teacher not having the certificate of qualifications, which a statute provides for,[13] or by anyone in unlicensed peddling,[14] the price agreed to be paid for goods sold contrary to a revenue law,[15] or for a fertilizer sold without the inspection which a statute requires,[16] or for anything knowingly furnished to a public enemy, or in aid of a rebellion,[17] or sold for any other use which the law forbids,[18] none of these, and no other thing promised, for what is done or given to violate any rule or regulation of law, cannot be effectually sued for in any tribunal of justice.[19]

[4] Haviland v. Halstead, 34 N. Y. 643; Paddock v. Robinson, 63 Ill. 99.

[5] Baker v. Mnfrs. Ins. Co., 12 Gray, 603; Flemming v. Marine Ins. Co., 4 Wheat. 59. See Hoy v. Holt, 10 Norris (Pa.), 88; Blodgett v. American Nat. Bank, 49 Conn. 9.

[6] Weed v. Weed, 94 N. Y. 243; Bilbie v. Lumley, 2 East, 469; Stevens v. Lynch, 12 East, 38.

[7] Wells v. People, 71 Ill. 532.

[8] White v. Buss, 3 Cush. 448.

[9] Gale v. Leckie, 2 Stark. 107.

[10] Ferguson v. Norman, 5 Bing. (N. Car.) 76.

[11] Hathaway v. Moran, 44 Me. 67; Lord v. Chadbourne, 42 Me. 429; Cook v. Philips, 56 N. Y. 310; Bemis v. Becker, 1 Kan. 226; Dillon v. Allen, 46 Iowa, 229.

[12] Stanley v. Nelson, 28 Ala. 514; Milton v. Haden, 32 Ala. 30; Madison Ins. Co. v. Forsythe, 2 Ind. 483; Siter v. Sheets, 7 Ind. 132; Ellsworth v. Mitchell, 31 Me. 247; Bayley v. Faber, 5 Mass. 286; Farrar v. Bartow, 5 Mass. 395; Wheeler v. Russell, 17 Mass. 258; Roney v. West, 4 N. H. 285; Carleton v. Whitcher, 5 N. H. 196; Brackett v. Hoyt, 9 Fost. (N. H.) 264; Solomon v. Dreschler, 4 Minn. 278; Elkins v. Parkhurst, 17 Vt. 105; Spalding v. Preston, 21 Vt. 9; Ferrett v. Bartlett, 21 Vt. 184; Rutland Bank v. Parsons, 21 Vt. 199; Bancroft v. Dumas, 21 Vt. 456; Armstrong v. Toler, 11 Wheat. 258.

[13] Ryan v. Dakota School Dist., 27 Minn. 433; Wells v. People, 71 Ill. 532.

[14] Stewart v. Lothrop, 12 Gray, 52.

[15] McConnell v. Kitchens, 20 S. Car. 430; Deans v. McLindon, 30 Miss. 343.

[16] Woods v. Armstrong, 54 Ala. 150; Pacific Guano Co. v. Mullen, 66 Ala. 582; Johnston v. McConnell, 65 Ga 129. See Niemeyer v. Wright, 75 Va. 239.

[17] Hanauer v. Doane, 12 Wall. 342; Oxford Iron Co. v. Spradley, 46 Ala. 98; Oxford Iron Co. v. Spradley, 51 Ala. 171; Lewis v. Latham, 74 N. Car. 283.

[18] Swanger v. Mayberry, 59 Cal. 91.

[19] Kerr v. Birnie, 25 Ark. 225; Thorne v. Travelers' Ins. Co., 80 Smith (Pa.), 15; De Groot v. Van Duzer, 17 Wend. 170; Arnot v. Pittston, etc. Coal Co., 68 N. Y. 558; Capehart v. Rankin, 3 W. Va. 571; Stevens v. Perrier, 12 Kan. 297. As to limitations of this doctrine, see Warren v. Mnfrs. Ins. Co., 13 Pick. 518; Peterson v. Christensen, 26 Minn. 377.

4. *What will be Construed as, or the Equivalent of, Such Stipulations.*—When a contract contains a condition precedent—that is, when a stipulation is to bind the party only upon the transpiring of a certain designated event--such party cannot be in default so long as, from any cause, the condition remains unperformed.[20] In such a case, it is immaterial that the performance of the condition was prevented by the act of God.[21] And upon this principle, when a policy of life insurance was, by its terms, to be void if the insured should go beyond a designated line without a written permit from the insurance company, and, under such permit, limited to a day therein mentioned, the insured went beyond the designated line, and by reason of sickness was prevented from returning, the condition of the policy was held to be still in force.[22] If the subject-matter of the contract is, contrary to the belief of the parties, not in existence, there being nothing to which it can attach, and the formal mutual consent of the parties being the product of mutual mistake, there can be no contract. For instance, a deed which the parties supposed to convey land, but in fact conveying nothing;[23] an obligation which the parties look upon and regard as legal, but not so in fact, and the question not even doubtful;[24] a patent apparently good, but void for lack of utility and novelty,[25] these may be said to be specimens of apparent contracts which a court of equity will set aside, or a court of law will treat as void.[26] This doctrine extends further, as in cases where the subject-matter of the contract has ceased to exist, prior to the performance of the conditions of the contract, as if the contract assumes the continued existence of the thing, then, performance becoming due, if, without the fault of the parties, the thing has ceased to exist, the case has necessarily become one of mutual mistake, and the duty to perform no longer remains.[27] For example, the lessor of a hotel covenanted with the lessee that the hotel should be supplied with water from a certain spring in the same manner as it then was, and the spring became dry, the covenant was held not to be violated.[28] However, express terms of warranty exclude the ordinary construction, it having been said in many cases that "when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[29]

5. *How in the Absence of Such Stipulations, and Further Thereof.*—Within this doctrine the "act of God" may be defined as some manifestation of nature to which man has not contributed, and which he cannot overcome, such as extreme cold, a tempest, or lightning and the fires it kindles, but not a fire from an ordinary accident.[30] And the "act of the public enemy" may be defined as to the restraints or ravages of war, but not of a robber or a mob.[31] It is a well settled principle, universal in its application, that the constitutional provision against impairing the obligation of contracts does not restrain legislation from making unlawful the thing lawfully agreed to be done. When the carrying out of the provisions of a contract is thus forbidden by law, it is uniformally held that the obligor is excused.[32] In a Michigan case, it was held[33] that a covenant in the lease of a wooden building to rebuild the same in case of its destruction by fire, was released by the subsequent passage of a municipal ordinance prohibiting the erection of wooden buildings in that locality. The authorities also seem

[20] Bruce v. Snow, 20 N. H. 484; Baltimore, etc. R. R. v. Polly, 14 Gratt. 447.

[21] Mizell v. Burnett, 4 Jones (N. Car.), 249.

[22] Evans v. U. S. Life Ins. Co., 64 N. Y. 304.

[23] Murphy v. Jones, 7 Ind. 529. See Fiermood v. Rouser, 17 Ind. 461; Sheldon v. Harding, 44 Ill. 68; Anderson v. Armistead, 69 Ill. 452; Curtis v. Clark, 133 Mass. 509; Webster v. Lawa, 89 N. Car. 224.

[24] Jarvis v. Sutton, 3 In I. 289; Logan v. Mathews, 6 Barr, 417. See Allen v. Prater, 30 Ala. 458; Fleming v. Ramsey, 10 Wright (Pa.), 252.

[25] Bierce v. Stocking, 11 Gray, 174; First Nat. Bank v. Peck, 18 Kan. 660; Cross v. Huntley, 13 Wend. 385; Vaughan v. Porter, 16 Vt. 266; Clough v. Patrick, 37 Vt. 421; Dickinson v. Hall, 14 Pick. 217.

[26] Scruggs v. Driver, 31 Ala. 274; Harrell v. De Normandie, 26 Tex. 120; Ketchum v. Catlin, 21 Vt. 191; Allen v. Hammond, 11 Pet. 63.

[27] Walker v. Tucker, 70 Ill. 527.

[28] Ward v. Vance, 12 Norris (Pa.), 499.

[29] See Burns v. Prather, 21 Ill. 217; School District v. Dauchy, 25 Conn. 530; Jennson v. McDaniel, 25 Miss. 83.

[30] Chicago, etc. R. R. v. Sawyer, 69 Ill. 285; Price v. Hartshorn, 44 N. Y. 94; Merchants' Despatch Co. v. Smith, 76 Ill. 542; Vail v. Pacific R. R., 63 Mo. 236.

[31] State v. Moore, 74 Mo. 413; Sugarman v. State, 28 Ark. 142; Lake Shore, etc. Ry. v. Bennett, 89 Ind. 457.

[32] Baker v. Johnson, 42 N. Y. 126; Mississippi, et R. R. v. Green, 9 Heisk. 588.

[33] Cordes v. Miller, 39 Mich. 581.

quite uniform upon the question that when the law creates a contract or imposes a duty upon one, performance is excused if the thing becomes impossible in the absolute sense we are now considering. Within this doctrine it may be said that a person thus obligated is not required to contend with the Almighty, or in his private capacity to overcome the enemy.[34] Further illustrations of the doctrines of this subtitle may be said to be that when the lessee of a house and land is driven off by the public enemy, or if the house is destroyed by the act of God, he is not freed from his covenant to pay rent;[35] *a fortiori*, he is not if the house is destroyed by an accidental fire.[36] This is a sound rule of law for which two excellent reasons exist: first, the lease creates a vested estate in the realty, and the covenant to pay rent is but a specification by what terms and installments the consideration is to be given;[37] secondly, the act of God in no manner interfered with the payment of the consideration. If there is a failure of the consideration for a promise through the act of God, the obligor is discharged; as if, for instance, one agreed to pay a certain sum of money for tuition during a specified term, but was sick, he was discharged from payment. The sickness which, in law, is the act of God, did not disable him to pay, but it rendered impossible his receiving the instruction, which was the foundation for his promise. Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive or shall be capable of performing the contract.[38] So where one agrees to render personal service to another, or to do for him anything else which cannot be done by proxy, or for the doing of a thing of this nature by another, is released if the act of God in the form of sickness or death prevents the doing thereof;[39] and no action can be maintained against him or his personal representatives as for a breach of the contract.[40] When the thing to be done is of a nature not requiring the services of the promisor in person, his sickness creates no impossibility, for he can perform by proxy, or, if in such a case, he dies, his personal representatives are entitled to perform the contract and collect the compensation; and as a rule they must do it or respond in damages.[41] On the other hand, the surviving party is thus in default if he presents performance by the personal representatives of the deceased.[42] Whether sickness can be considered as constituting an excuse or not, as being the act of God, will depend largely upon the peculiar circumstances of each particular case, and in a measure upon the special views of the particular tribunal. According to one case, if, at the place where labor contracted for is to be done, a fatal and contagious disease prevails during the entire time, rendering it impossible to procure workmen, and imprudent to work, performance will be excused. Or if, before the contagion came, the work was executed in part, the party may recover for it on a *quantum meruit*.[43] In another case, a public school was suspended on account of smallpox, and it was held that the teacher was entitled to recover the wages provided for in his contract.[44] When there can be substantial performance of what in the exact terms of the contract is impossible, it will be required.[45] And when the undertaking is to do one of two things, the impossibility of doing the one does not excuse the doing of the other.[46] Performance will be excused by the service of judicial process interrupting and rendering impossible the doing of the thing.[47] A failure to appear in compliance with a recognizance may be excused by an arrest and imprisonment in another county,[48] or imprisonment by a valid

[34] Norcross v. Norcross, 53 Me. 163; State v. Clarke, 73 N. Car. 255; Havens v. Lathene, 75 N. Car. 505; Moseley v. Baker, 2 Sneed (Tenn.), 362.

[35] 3 Kent, Com., 465.

[36] Izon v. Gorton, 5 Bing. (N. Car.) 501.

[37] See Dowdy v. McLellan, 52 Ga. 208; Wilkinson v. Cook, 44 Miss. 367; Calloway v. Hamby, 65 N. Car. 631.

[38] Knight v. Bean, 22 Me. 531; Yerrington v. Greene, 7 R. I. 589.

[39] Spalding v. Rosa, 71 N. Y. 40.

[40] Knight v. Bean, 22 Me. 531; Siler v. Gray, 86 N. Car. 566; Harrington v. Fall River Iron Works, 119 Mass. 82.

[41] Siler v. Gray, 86 N. Car. 566; Smith v. Wilmington Coal, etc. Co., 83 Ill. 498.

[42] White v. Allen, 133 Mass. 423.

[43] Lakeman v. Pollard, 43 Me. 463.

[44] Dewey v. Alpena School Dist., 43 Mich. 480.

[45] White v. Mann, 26 Me. 361; Williams v. Vanderbilt, 28 N. Y. 217.

[46] Drake v. White, 117 Mass. 10; State v. Worthington, 7 Ohio, 171. See Smith v. Duell, 16 N. H. 344; Erie Ry. v. Union Locomotive, etc. Co., 6 Vroom. 240.

[47] Walker v. Fitts, 24 Pick. 191; Lord v. Thomas, 64 N. Y. 107; People v. Globe Mut. Life Ins. Co., 91 N. Y. 174; Bain v. Lyle, 18 Smith (Pa.), 60; Ohio, etc. Ry. v. Yoke, 51 Ind. 181; Leopold v. Salkey, 89 Ill. 412.

[48] People v. Bartlett, 3 Hill (N. Y.), 570.

order or judgment of another court,[49] and a failure to completely perform a contract for a public work may be excused by the repeal of the statute authorizing its construction.[50] The liability of the principal, by reason of sickness, to appear at court and answer an indictment found against him, according to the terms of his recognizance, is a good defense to an action brought against his sureties upon the recognizance.[51] So, of the enlistment of the principal in the United States army in time of war.[52] And one bound for another's appearance in court is excused, if, before the day, the latter dies.[53] In all contracts, conditions are either precedent or subsequent, but whether a particular condition is the one or the other, if, when the contract is made, it is impossible, but not unlawful it, only is void; and the rest of the contract is enforceable as though it contained no such condition.[54] If a condition precedent is not known to be impossible at the time of making the contract, and it becomes so by the act of God, the other party cannot be placed in default while even for this cause it remains unperformed.[55] In Illinois, it is held[56] that neither party to a contract imposing obligations reciprocal and continuous can compel the other party to perform his part of the contract while the other persistently refuses or neglects to comply with the obligations imposed upon him. And in a more recent case it is held[57] that both parties are excused from performance of a contract entered into with reference to the existence of a particular thing, by the destruction of such thing without the fault of either before the time of performance, but neither is entitled to recover for part performance.

Evansville, Ind. CHAS. W. MCKINNEY.

[49] Belding v. State, 25 Ark. 315.
[50] Jones v. Judd, 4 N. Y. 411.
[51] People v. Withers, 37 N. Y. 586.
[52] People v. Cushney, 44 Barb. 118; Commonwealth v. Terry, 4 Duv. (Ky.) 383.
[53] Scully v. Kirkpatrick, 29 Smith (Pa.), 324.
[54] Hughes v. Edwards, 9 Wheat. 489. See Barksdale v. Elam, 30 Miss. 694.
[55] Mizell v. Burnett, 4 Jones (N. Car.), 249; Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276.
[56] Covington v. Sink, 63 Ill. App. 527.
[57] Siegel v. Eaton & P. Co., 165 Ill. 550.

CRIMINAL LAW — ATTEMPT TO COMMIT BURGLARY.

PEOPLE v. YOUNGS.

Supreme Court of Michigan, December 12, 1899.

1. To constitute an attempt at common law, something more than an intention or purpose to commit crime is necessary; and this is not changed by the statute declaring a punishment for one who shall attempt to commit a crime, and in such attempt shall do any act toward the commission of the offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same.

2. One cannot be convicted of an attempt to enter and break a dwelling merely because he agrees with one to do so, meets him at a saloon at the appointed time, with a revolver and slippers to be used in the house, and goes into a drug store and purchases some chloroform to use, being arrested when he comes out.

Grant, C. J., dissenting.

MONTGOMERY, J.: Two questions present themselves: (1) Does the statute in question change the common-law rule as to what constitutes an attempt to commit an offense? (2) If not, whether the facts stated show an attempt, as defined at the common law. In my opinion, both these questions should be answered in the negative. The statute, in terms, relates to attempts to commit a crime, and, to make the intent still more certain, provides that, before the offense shall be complete, the accused shall do some act toward the commission of such offense. This does not eliminate any of the elements of the common-law offense of attempt to commit crime. On the contrary, it enumerates them. To constitute an attempt, at the common law, something more than an intention or purpose to commit crime is necessary. As was said by Field, C. J., in People v. Murray, 14 Cal. 159: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." In Reg. v. Taylor, 1 Fost. & F. 512, the chief baron said: "The act, to constitute a criminal attempt, must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." See also McDade v. People, 29 Mich. 49; Hicks v. Com. (Va.), 9 S. E. Rep. 1024; Reg. v. McCann, 28 U. C. Q. B. 514; Stabler v. Com., 40 Am. Rep. 653; Com. v. McDonald, 5 Cush. 367; Griffin v. State, 26 Ga. 493; People v. Machen, 73 Mich. 27, 40 N. W. Rep. 925; 3 Am. & Eng. Enc. Law (2d Ed.), 266. The

sentence should be set aside, and the prisoner discharged.

NOTE.—One of the judges dissents from the conclusion of the court in the principal case, and in view of the close character of the question involved it is of value to call attention to the grounds upon which the dissenting judge predicated his opinion. The majority of the court held that the acts in evidence do not constitute an attempt to commit the crime, but only a preparation which the statute does not cover. Two things are essential to constitute an attempt under the statute: 1st. The intent to commit the crime. 2d. Some act or acts which are necessary toward its preparation. Hochheimer in his recent work on the Law of Crimes and Criminal Procedure, § 516, thus defines a common law attempt: "Any act in the nature of a direct movement toward the commission of an offense is an attempt to commit the offense. It is sufficient that one step be taken toward the actual commission of the crime, but mere preparation or planning is insufficient." Wharton says: "An attempt is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by causes outside of the actor's will, in a deliberate crime." 1 Whart. Cr. Law, § 179. See also 3 Am. & Eng. Enc. Law (2d Ed.), 250. The authorities generally recognize the difficulty in determining what constitutes an attempt under this and similar statutes. How the remote act, coupled with the felonious intent, must be from the consummation of the crime, depends upon the various circumstances of each case. There is no simple and infallible test. 3 Am. & Eng. Enc. Law (2d Ed.), 265. The act need not be the last proximate one prior to the consummation. The felonious intent in this case is clearly established. The acts done were clearly in furtherance of that intent. Whether they were too remote is the sole question. In the early case of Rex v. Sutton, 2 Strange, 1074, the prisoner was held properly convicted for having in his custody and possession two iron stamps, with the intent to impress the scepters on six pences and to pass them off for half guineas. The prisoner was held properly convicted of an attempt to commit burglary where he intercepted while going up the steps of a house, in the nighttime, where he had no legitimate business, and had burglarious tools in his possession. Com. v. Clark, 10 Pa. Co. Ct. Rep. 444. The statute in that case authorized conviction for an attempt to commit the crime. It contained no language like that in the statute before us. The court commented upon the fact that the prisoner had left the public street, to go upon private property. If he had been arrested in the highway, why would not the attempt have been as complete? In an attempt to commit arson, it was held that those who were absent, knowing with what intent the others went, and assenting to it, are principals. Uhl v. Com., 6 Gratt. 706. Where one procured dies for stamping and imitating coin, but was apprehended before he obtained the metal and the chemical preparations necessary for making them, he was held properly convicted of an attempt. Reg. v. Roberts, 33 Eng. Law & Eq. 553. The chief justice in that case stated that he would not attempt to lay down any rule as to what act done in furtherance of criminal intent will warrant an indictment, saying that he did not see the line precisely himself, but said, "No one can doubt that the procuring of dies and machinery was necessarily connected with the offense, and was for the express purpose of the offense." Procuring indecent prints, with the intent to publish them, was held an indictable offense, while preserving and keeping them with a like intent would not be. Dugdale v. Reg., 1 El. & Bl. 435. The principle of that case is that procuring is an overt act, while possession alone is not. Where one procured camphene and other combustibles, placed them in his room, solicited another to use them in burning a barn, and promised to give him a deed to land if he would do so, he was held properly convicted of an attempt to commit arson. McDermott v. People, 5 Parker, Cr. Rep. 102. It is there stated: "The two important and essential facts to be established to convict a person of an offense, are: First, an intent to commit the offense; and, second, some overt act, consequent upon that intent, toward its commission. So long as the act rests in bare intention, it is not punishable. '*Cogitationis pœnam nemo patitur.*' It is only when the thought manifests itself by an outward act in or toward the commission of an offense, that the law intervenes to punish. As we cannot look into the mind to see the intent, it must, of necessity, be inferred from the nature of the act done; and, if that be unlawful, a wicked intent will be presumed. These are fundamental legal principles. Now, applied to the facts of this case, what do we find? We find that the defendant intended to commit the crime of arson. Indeed, he had committed the offense 'already in his heart.' What were the overt acts toward the commission? He had prepared camphene and other combustibles, and had them in his room, and then he went a step further, and solicited McDonnell to use those combustibles to burn the building, promising him, if he would do so, to 'give him the deeds of the place, and assign to him his right in the same.' We have, then, the fixed design of the defendant to burn this barn, and overt acts toward the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out; for the intent to do the wrongful act, coupled with the overt acts toward its commission, constitutes the attempt spoken of by the statute." Where the prisoner entered into conspiracy with others to place a dangerous explosive upon the track of a railroad company, so that it would be exploded by a passing train, had met the other conspirators at the house of one of them, where the bomb was prepared and committed to the prisoner, and the conspirators agreed to meet at half past 4 o'clock in the morning, at the junction of two streets, for the purpose of immediately proceeding to put their project into execution, and the prisoner had left his dwelling to join his confederates pursuant to the appointment made on the preceding day, approached the place of rendezvous with the bomb in his possession, and was intercepted by the police, he was held properly convicted. The statute in that case provided that "any person who attempts to maliciously place an obstruction upon the track of a railroad," etc. People v. Stites, 75 Cal. 570, 17 Pac. Rep. 693. See also People v. Mann, 113 Cal. 76, 45 Pac. Rep. 182. Where one had taken an impression of a key to a warehouse, and prepared a false key, which he had in his possession, with the intent to break and enter, he was properly convicted under a statute identical with this. Griffin v. State, 26 Ga. 493.

"The cases upon this subject," says the dissenting judge, "are very numerous, and undoubtedly many might be cited from which it might fairly be inferred that the courts which decided them might hold that the acts in this case were too remote, and constituted merely a preparation which the law does not recognize and punish as criminal. One of the strongest cases cited is People v. Murray, 14 Cal. 159, where it

was held that an attempt to commit an incestuous marriage was not established by an elopement for the avowed purpose, and the request to another to go for a magistrate to perform the ceremony. It was also said that the attempt could only be consummated by engaging the officer to perform the ceremony, with the parties standing before him to take the vows preparatory to the contract of marriage. The statute in that case is not stated in the opinion. Bishop, in speaking of this case, says, 'We cannot safely assume that it will be followed by all courts.' 1 Bish. New Cr. Law, § 764. I cannot yield it my assent. In Reg. v. McCann, 28 U. C. Q. B. 514, three entered into conspiracy to commit burglary. One was kept away by his father, who had discovered their design. The other two (the prisoners) went to within about 14 feet of the house, stood outside of the fence a while, and then went away. It might well be held in that case that there was no attempt, on the ground that they had abandoned their intent to commit the crime. The court said: 'The bare fact that the prisoners were seen looking at the house at the distance of thirteen or fourteen feet is not of itself a crime, and, although it may be said they were near the premises upon the understanding previously entered into, yet there is no evidence of the fact. For all that appears, they may have changed their minds, and, in the absence of their comrade, went there with some other object, or for some other purpose, and not with the intent charged.' We are also cited to Hicks v. Com., 86 Va. 223, 9 S. E. Rep. 1024. In that case the prisoner was charged with an attempt to administer poison, by soliciting one, Laura Long, for a promised reward, to administer the same, and that the poison was delivered to her. The court said, 'It was not charged that she agreed to administer the poison, or that she did any act toward the commission of the crime.' On the contrary, she testified that she never did agree to administer it, and never intended to; that she wanted to fool Hicks, because she wanted to catch him, and to let other people know it. One justice dissented. Under a statute identical with ours, in a charge of an attempt to commit incest, mere solicitation was held insufficient; and the court say: 'The statute must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step toward the actual commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense.' Cox v. People, 82 Ill. 191. Counsel say that though one may intend to commit a crime, and do many things toward its commission, yet he may repent, and the law gives to him a *locus pœnitentiæ*. But where is this *locus*? Is it at the window which he proposes to enter? or at the gate to the inclosure of the dwelling? or at the dividing line between the public highway and private property? How much distance and time does the law give him to repent? Conversions like that of Paul are rare, especially among criminals. The law will not 'o'erleap itself' to find a time and place for repentence, when the criminal has started forth, armed and equipped to carry out his felonious intent. It may refuse conviction when repentence and abandonment are shown, but not till then. The only reasonable and just rule, in my judgment, is that when one has prepared himself with weapons and tools for the purpose of accomplishing a crime, and has started out to accomplish it, the offense is complete, unless it is shown, as was the case in Reg. v. McCann, that he had abandoned his purpose. It would be difficult, if not impossible, to harmonize all the cases. No two are alike in their facts. In the case before us, the plan was perfected. All the preparations were made for carrying it out. The respondent left his home, with the revolver and slippers; had traveled nine miles toward the place; ha then provided himself with chloroform, and loaded his revolver; had met his supposed co-conspirator at the place of rendezvous. All these acts were done for the express purpose of committing the crime, and he was prevented from the commission by his arrest. I think that the steps taken constitute something more than a bare preparation, and were acts toward the commission of the crime, within the meaning of the statute."

JETSAM AND FLOTSAM.

UNCONSTITUTIONAL LEGISLATION AS A DEFENSE.

The liability of an officer who executes a law which is later held void is one of the unsatisfactory phases of the American doctrine of unconstitutional legislation. It is a development of an older problem; the defense to a trespass afforded by judicial process. An officer is not protected in the execution of warrants which disclose on their face their invalidity. This is not, however, limited to defects of form. An excess of jurisdiction, not dependent on some error in the previous procedure, is said to appear from the face of the document since an officer of court is presumed to know the law. This reasoning, first applied to the common law limits of jurisdiction, has been extended, in most States, to an exercise of jurisdiction given by unauthorized local ordinances and statutes later held unconstitutional. And so, although it is admitted that a judge of a superior court is not liable for any judicial utterance, subordinate justices, sheriffs and even public prosecutors have been held liable for enforcing mandates of legislative bodies. Kelley v. Bemis, 4 Gray, 83; Merrit v. St. Paul, 11 Minn. 223; Warren v. Kelley, 80 Me. 512. A few States, however, have repudiated this doctrine. Edes v. Boardman, 58 N. H. 580; Brooks v. Mangan, 86 Mich. 576. The reasoning of this latter case was recently affirmed and applied in defense of a public officer who procured issue of process under an ordinance which the court held invalid. Tillman v. Beard (Mich.), 80 N. W. Rep. 248.

In continental Europe the need of decisive executive action in States surrounded by enemies gave rise to a distinct system of administrative law for the protection of such officials. England, however, since freer from external pressure, developed no such system. In this country, though it is thought that the foundations are being laid for a national administrative law, as yet it has not been generally recognized. The problem of unconstitutional legislation, however, is peculiarly our own, and it may be suggested that old precedents derived from England should not prevent our working out in this case some system of administrative protection.

It would seem, moreover, that a distinction may be drawn between those early decisions and the principal case. The reason for the original doctrine that an executive officer is liable for excess of jurisdiction was the danger of abuse of official power. From unconstitutional laws, however, our danger is not abuse of process, but abuse of legislative discretion. It is, moreover, not unfair to hold that officers are bound to know the extent of their jurisdiction at common law;

but to say they must know the true limits of the authority of a legislature is to demand an impossibility. The maxim that "ignorance of law excuseth no one" is here inapplicable. The officer does not rely on the statute as law, but on the statute as a fact—as an order or declaration of a body which he is bound to obey. To reply with the fiction that such statute is as if it never had been is a confession of weakness. Overruling an act of legislature is a decision to be made with reluctance even by a co ordinate department. It would be, therefore, highly unbecoming in a subordinate official to deny validity to a statute. To compel him to such a decision is to abandon a cardinal principle of constitutional interpretation. In view of these objections, one would think that the liability attached to officers who exceed their common law jurisdiction should not be extended in this country to express statutory additions to their jurisdiction in which the legislature has exceeded its powers.—*Harvard Law Review.*

BOOK REVIEWS.

WIT AND HUMOR OF BENCH AND BAR.

Marshall Brown, the compiler, has in this volume collected 600 pages of choice anecdotes and witty stories, sufficient to supply a practicing lawyer with amusing illustrations to use in his jury trials for a lifetime. Wit in its finest sense is wisdom. The appeal of the Irish barrister was pathetic when he said: "Gentlemen of the jury, think of his poor mother—his only mother." We quote a few of the odd sayings found in a hasty glance through this volume:

Mr. Elbert Hubbard, in his charming "Little Journeys to the Homes of American Statesmen," relates that when Patrick Henry arrived at Williamsburg, Va., he sought out his old friend Thomas Jefferson, afterwards President of the United States, because he liked him—and to save a tavern bill. And Henry announced that he had come to Williamsburg to be admitted to the bar. "How long have you studied law?" asked Jefferson. "Oh, for six weeks last Tuesday," was the answer. Tradition has it that Jefferson advised Henry to go home and study at least a fortnight more before making his application. But Patrick declared that the way to learn law was to practice it. And he was duly admitted.

Baron Alderson had a profound dislike for scientific witnesses, especially those of the medical profession, called upon to give an opinion upon the evidence they had heard in court; and he rarely failed in proposing some question to them which eventually proved a floorer. At the end of a long examination of a celebrated medical man, called to establish the incompetency of a deceased testator to make a will, the witness unfortunately said that he believed "all persons were subject to temporary fits of insanity." "And when they are in them," asked the judge, "are they aware of their state?" "Certainly not, my lord," was the reply; "they believe all they do and say, even if nonsensical, to be perfectly right and proper." "Good Lord!" exclaimed Alderson, "then here have I taken no less than thirteen pages of notes of your evidence, and, after all, *you* may be in a fit of temporary insanity, talking nonsense, and believing it to be true!"

"What are you?" said the judge.

"An insane expert, your honor."

"Oh, you are! Well, you may step down, sir. I don't want any crazy persons giving testimony in this court!"

After the usual questions being asked a hayseed candidate for jury duty, the examining lawyer said: "Juror look upon the prisoner; prisoner, look upon the juror." The old man adjusted his spectacles and peeringly gazed at the prisoner for full half a minute, when he turned his eyes toward the court and earnestly said: "Judge, I'll be condemned if I don't believe he's guilty." The court was considerably exasperated at having lost a juror, but the more humorously inclined had a good laugh at the old man's premature candor.

A delegation of preachers from Chicago once waited upon Abraham Lincoln to urge the issuance of the emancipation proclamation. The spokesman urged the claim with ecclesiastical dignity by saying: "The Lord sends this commission to you, President Lincoln." "Perhaps so; but isn't it strange that He should send His message by way of Chicago?" To another delegation urging immediate action he said: "If you call the tail of a sheep a leg, how many legs will the sheep have?" "Five," replied the spokesman. "No," said the bothered president, "it would only have four. Calling the tail a leg wouldn't make it one."

A man from Boston having a claim against the government had called upon President Lincoln by appointment. Mr. Lincoln took his papers and said: "I can't look over this matter now, but if you will leave the papers I will attend to it as soon as I can find time." There were a number of parties opposing the claim, and I could see that the man wanted to get some idea as to what his chances were before he left. He volunteered a question, hoping to draw the President out. Lincoln appreciated his feeling and told the following: "You make me think of a lawyer out in Illinois who wanted to turn merchant. He had not succeeded at the law, and he decided to close his office and open a store. He wrote to New York for a stock of goods and offered his fellow-attorneys as references. The wholesale house wrote to one of these as to the responsibility of the would-be storekeeper, whom we will call Tom Jones. The reply which was received was about as follows: 'I think Tom Jones is good. I know he is rich. His assets, I should say, amount to at least $200,000. He has, in the first place, a wife, a beautiful dark-haired brunette, who is worth to him or to any man $100,000. I am sure he would not sell her for that. I know I should not if she belonged to me. He has also two children, a boy and a girl. The boy is perfectly sound. He is eleven years old, and is brisk, energetic and smart. I don't think he could be bought at any price. I know Jones would not sell him for $50,000. I think that $49,950 would be a low estimate for the girl, as she has the making of a good woman in her. In addition to these items, Jones has a table in his office worth $2, two chairs worth fifty cents each, an inkstand worth fifteen cents, and a double-bladed Barlow knife, which I put at a dime, and, besides, there is in his office a great big rat-hole, which is worth looking into.' And so," concluded the president, "although I don't know much about your claim, I think there may be a great big rat hole there which may be worth looking into, and I will look into it." The man laughed and went away well pleased. A handsomely prepared volume, 8vo., bound in cloth. Published by T. H. Flood & Co., Chicago.

BOOKS RECEIVED.

The Law of Animals. A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising Therefrom. By John H. Ingham, of the Philadelphia Bar. Philadelphia, T. & J. W. Johnson, & Co., 1900. Law Sheep, p. 800. Price $6.00. Review will follow.

HUMORS OF THE LAW.

A colored man was arraigned before a magistrate charged with carrying deadly weapons. A razor was found in the defendant's pocket, and so, when he was brought to the bar of justice, the case against him seemed pretty strong. To the surprise of the judge and everyone else in the court room he pleaded "not guilty."

"How can you account for the razor being found in your possession?"

The defendant grinned and said: "I'll try an' splain dat jedge."

"I'd like to hear you," said the judge.

"Did anyone threaten your life?"

"No, sah; dey warn't nobody t'reat'nin' mah life, sah."

"Then why did you carry it?"

"I done toten hit 'roun', sah, fur purtecshun, sah."

"For protection, eh?" Why, you just admitted that your life was in no danger."

"Yo, doan' un'erstan' me, jedge; I'll try an' 'luciate tings, sah. Down ter de house whar I'se a-boardin', sah, dey is a powahful lot of low down coons, w'at jes' wouldn't stop at takin' tings w'at doan' b'long ter dem, so I jes' put hit in mah pocket fur purtecshun, sah, purtecshun ob de razah, sah."

An Irish counsel, having lost a case which had been tried before three judges, one of whom was esteemed a very able lawyer, and the other two but indifferent, some of the other counsel chaffed him a good deal. "Well now," says he, "who the devil could help it when there were a hundred judges on the bench?" "A hundred," said a bystander, "there were but three." "By St. Patrick," replied the counsel, "there was one and two ciphers."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Suicide—Presumption.—In an action on a policy insuring against injuries sustained through "external, violent and accidental means," except that, in case of injury wantonly inflicted by assured, or inflicted while insane, the measure of liability is to be the premiums paid, the burden, on the issue of suicide, is on plaintiff to show that assured did not commit suicide, and is not shifted by the presumption that all men are sane, and naturally desire to avoid death.—FIDELITY & CASUALTY CO. OF NEW YORK v. WEISE, Ill., 55 N. E. Rep. 540.

2. ALIENS—Exclusion of Chinese.—The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where it is admitted that he left it when 3 years old, and has remained away for 16 years.—IN RE LOUIE YOU, U. S. D. C., D. (Oreg.), 97 Fed. Rep. 580.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity—Reservation.—A conveyance to a trustee for the benefit of creditors, authorizing the trustee, in his discretion, to continue the grantor's business for one year, and, with the consent of a majority of the unpaid creditors at the expiration of the year, to continue operating the business a second year, and to make such purchases of additional stock for cash from the proceeds of the business as will aid in keeping up the business, and disposing of the other stock, is not void as containing a reservation for the benefit of the grantor.—HURST v. LECKIE, Va., 34 S. E. Rep. 464.

4. ASSIGNMENTS FOR CREDITORS—Surrender of Collaterals to Assignee.—The rule entitling a creditor of an estate assigned for creditors to dividends on the full amount of his claim, to the point of complete satisfaction, after he obtained partial satisfaction by a sale of collaterals subsequent to the assignment, does not enable the holder of a note against an assignor for creditors to claim dividends after surrendering the note and collateral to the assignee, in consideration of a payment by the assignee of a sum less than the face value of the note.—HENDRIE v. GRAHAM, Colo., 59 Pac. Rep. 219.

5. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—Assigned Property.—No allegation that a bank had knowledge that its agent and a trustee for the benefit of creditors of an insolvent stifled bidding at a sale of certain of the debtor's property under foreclosure, purchased by the bank, by agreeing to pay another creditor's claim, which the trustee thereafter paid from the assigned assets, being made in a proceeding for sale and distribution of the assigned estate, a decree requiring the bank to pay such sum for the creditor's benefit was erroneous.—PEABODY v. FOX COAL & COKE CO., Tenn., 54 S. W. Rep. 128.

6. ATTACHMENT—Affidavit—Trial.—In attachment in an action for goods sold, on an issue as to the truth of plaintiff's attachment affidavit that defendant had fraudulently disposed of his property, and had fraudulently contracted the debt sued on, it is not error to sustain an objection to a question as to whether de-

endant had made sales for less than cost from a stock of goods owned by him prior to his purchase from plaintiff, and as to whether defendant had expressed a desire to sell such stock for cash, in the absence of any offer on plaintiff's part to connect the evidence proposed with other proof showing its materiality.—JOHN V. FARWELL CO. v. MCGRAW, Colo., 59 Pac. Rep. 281.

7. ATTORNEY AND CLIENT—Fees—Determination.—In an action by one of several attorneys for fees for professional services rendered in a case in which he stood on an equal footing with the other attorneys, and did such work as was necessary to be done by him, the court will not undertake to accurately separate the services performed by each counsel, but will determine from all the facts and circumstances what is the fair value of the services sued for.—EAKIN V. PEEPLES HOTEL CO., Tenn., 54 S. W. Rep. 87.

8. ATTORNEY AND CLIENT—Services—Implied Contract.—A complaint by an attorney to recover on an implied contract for services rendered, alleging that the services were necessary, and that the benefit to defendant which accrued therefrom would have been lost but for such services, without alleging facts showing the necessity for the services, and that the benefit to defendant would have been lost, is insufficient, since such averments are mere conclusions.—CLEVELAND, C., C. & ST. L. RY. CO. v. SHRUM, Ind., 55 N. E. Rep. 515.

9. ATTORNEYS—Appearance.—Appearance of a deputy judge of the court as attorney in a case pending in the court, while not professional, is not ground for reversal, since, he being an attorney of the court, it had no power to prevent him from acting as attorney in the case.—FRENCH V. TOWN OF WATERBURY, Conn., 44 Atl. Rep. 740.

10. ATTORNEYS—Disbarment—Res Judicata.—A judgment of the circuit court disbarring an attorney from practice for two years on his plea of guilty to charges of fraudulent practices and the making of false affidavits in divorce cases, is conclusive against him in subsequent proceedings to disbar him in the supreme court on the same charges.—PEOPLE V. HILL, Ill., 55 N. E. Rep. 542.

11. BANKRUPTCY—Discharge—Buying Off Opposition.—Where a creditor who has filed specifications in opposition to the discharge of a bankrupt is induced to withdraw the same, and suffer the discharge to be granted, in consideration of part payment of his claim made to him by a friend of the bankrupt, it is a fraud upon the act, and ground for vacating the discharge, although done without the procurement or participation of the bankrupt, if he was privy to the arrangement and consented to it.—IN RE DIETZ, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 563.

12. BANKRUPTCY—Dissolution of Liens.—Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," is to be construed as applying to voluntary as well as involuntary cases, since section 1, cl. 1, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition;" and a levy of execution on personal property is dissolved by an adjudication of the debtor as a voluntary bankrupt within four months thereafter, although the suit in which the execution issued was begun more than four months before.—IN RE VAUGHAN, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 560.

13. BANKRUPTCY — Examinations—Creditor as Witness.—The provisions of the bankruptcy act determining the forum in which suits by a trustee in bankruptcy against an adverse claimant may be brought do not in any way limit the right of the trustee to examine any competent witness concerning the acts, conduct or property of the bankrupt; and he may examine a creditor, whose claim he disputes, concerning the extent and nature of the bankrupt's alleged indebtedness to him, without regard to the question as to what court, federal or State, would have jurisdiction of the trustee's suit against such creditor if he should decide to sue.—IN RE CLIFFE, U. S. D. C., E. D. (Penn.), 97 Fed. Rep. 540.

14. BANKRUPTCY — Exemptions — Growing Crops.—Where the State statute exempts from execution a homestead of 40 acres of land used for agricultural purposes, a bankrupt, who has had such homestead set apart to him by his trustee, cannot claim, as exempt, in addition thereto, the crops growing on the land at the time of the filing of his petition in bankruptcy.—IN RE HOAG, U. S. D. C., W. D. (Wis.), 97 Fed. Rep. 543.

15. BANKRUPTCY—Fees of Referee.—The compensation of a referee in bankruptcy is fixed by the statute, and will not be abated or diminished in a particular case because some of the duties which ordinarily would be discharged by the referee, in the holding of hearings and making of orders, were assumed by the judge, at the request of the parties, on account of the magnitude of the interests involved, and the unusual character of the proceedings.—IN RE BARBER, U. S. D. C., D. (Minn.), 97 Fed. Rep. 547.

16. BANKRUPTCY—Jurisdiction—Suits by Trustee.—Bankruptcy Act 1898, § 23 b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is to be strictly construed as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; and this provision applies only to suits upon causes of action originally vested in the bankrupt, and which he might have maintained if there had been no adjudication in bankruptcy, and not to suits upon causes of action created by the bankruptcy proceedings, or vesting originally in the trustee as trustee. Of the latter the courts of bankruptcy have jurisdiction.—MURRAY V. BEAL, U. S. D. C., D. (Utah), 97 Fed. Rep. 567.

17. BANKRUPTCY—Jurisdiction — Surrender of Property by Bankrupt.—A court of bankruptcy has authority to order the bankrupt to pay over to the trustee money in his hands which belongs to his estate in bankruptcy, and to enforce his obedience by commitment as for contempt; but this power should be cautiously exercised, and only in cases where the bankrupt's present possession of the money, and his retention of it in willful disobedience of the order, are proved beyond a reasonable doubt.—IN RE MCCORMICK, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 566.

18. BANKRUPTCY — Opposition to Discharge.—Creditors opposing the bankrupt's application for discharge on the ground of his having concealed property from his trustee in bankruptcy, must establish the fact by satisfactory and sufficient evidence, or the opposition will be overruled and the discharge granted.—IN RE HIRSCH, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 574.

19. BANKRUPTCY — Opposition to Discharge.—The omission of a bankrupt to include particular property in his schedule of assets will not be ground for refusing his application for discharge, where such omission was not caused by a fraudulent intent to conceal the property from his trustee, but was the result of a mistake of law or of fact, or of an honest, though erroneous, belief that he had no available interest in the property.—IN RE MORROW, U. S. D. C., N. D. (Cal.), 97 Fed. Rep. 574.

20. BENEFICIAL ASSOCIATIONS—Benefits—Evidence.—Where an unincorporated society, organized for mutual insurance and indemnity in case of death or disability, conducted a beneficial department, in which all eligible members were required to participate, and assessments were levied and payments enforced under penalties, and, its constitution, though providing a method for prosecuting claims for benefits and adjusting them, and for collecting assessments to pay them, did not prohibit recourse to the courts for benefits re-

fused, the courts have jurisdiction to enforce the society's liability on benefit certificates.—BENSON v. GRAND LODGE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN, Tenn., 54 S. W. Rep. 182.

21. BILLS AND NOTES — Defense against Assignee.—Twenty members of an alliance executed their note to N, agent of the alliance, to be deposited with the C bank as collateral for money to be advanced to the alliance. Said note and the unpaid notes of the alliance were assigned by the bank to a firm in which N and seven of said signers were partners. Held, that in an action by said firm against the other signers for this contributive part of the amount borrowed from the bank, and not paid, breach of an agreement between N and the signers as to management of the business of the alliance, which agreement was not known to the bank, could not be used as a defense.—POTTS v. DULIN, N. Car., 34 S. E. Rep. 514.

22. BILLS AND NOTES — Forgery—Ratification.—In an action on a note claimed by defendant to be a forgery by a person not his agent, to estop him from denying liability by an implied ratification through failure to notify the holder within a reasonable time, defendant's failure to promptly repudiate his signature must have misled such holder, and caused him to adopt some course to his prejudice, which he would not have taken if he had not been misled by defendant's signature when it was brought to his notice.—FURNISH v. BURGE, Tenn., 54 S. W. Rep. 90.

23. BOYCOTT—Liability of Conspirators—Damages.—When it appears that several persons have similar or identical grounds of complaint, and entertain like feelings of resentment, against another, and when, for the gratification of such feelings, they, by their acts and utterances, endeavor to destroy his business, each being aware of the feelings and doings of the other, and approving the results accomplished, there is sufficient evidence of a combination or common purpose; and such persons are properly joined as defendants in an action in damages, and are liable *in solido* for punitory and exemplary, as well as actual, damages.—WEBB v. DRAKE, La., 26 South. Rep. 791.

24. BROKERS—Commissions.—A broker employed to procure a purchaser of a mine is entitled to his commissions, where an employee of his subagent procures a purchaser, though the broker did not himself introduce the purchaser to the mine owner.—LEECH v. CLEMONS, Colo., 59 Pac. Rep. 230.

25. BUILDING AND LOAN ASSOCIATIONS—Borrowing Member.—Where a borrowing member of a building and loan association, besides paying interest on the loan, pays a certain amount every month, as dues on his stock in the concern, he is entitled to credit for dues paid as another a like amount on his principal loan.—HALE v. THOMAS, Utah, 59 Pac. Rep. 241.

26. CARRIERS—Railroads—Transportation of Passengers — Unlawful Discrimination. — An indictment against a railroad company for an unlawful discrimination in the transportation of passengers, alleging the giving of a free pass over its road, does not show an undue preference when it fails to allege that by virtue thereof the holder received free transportation.—STATE v. SOUTHERN RY. CO., N. Car., 34 S. E. Rep. 527.

27. CARRIERS OF PASSENGERS — Negligence.—Where an action against an electric railway for injuries to a passenger was based on evidence of the negligence of the conductor of a car in stopping it to adjust the trolley after it had been thrown off by a passenger, the court properly refused to charge that the proximate cause of the collision and injury was the throwing off of the trolley.—BLANCHETTE v. HOLYOKE ST. RY. CO., Mass., 55 N. E. Rep. 481.

28. CONSTITUTIONAL LAW — Impairing Obligation of Contracts — Judgment.—The constitutional provision against the impairment by a State of the obligation o contracts does not afford basis for a suit in equity in a federal court by a party defeated in an action in a State court to set aside the judgment on the ground that it impaired the obligation of a contract.—ALLEN v. ALLEN, U. S. C. C. of App., Ninth Circuit, 97 Fed. Rep. 535.

29. CONSTITUTIONAL LAW — Sales of Patent Rights—Peddlers' Notes.—Ky. St. § 4223, requiring every "peddler's note" to be so marked, is not violative of the federal constitution, though it affects notes given for patent rights.—RUMBLEY v. HALL, Ky., 54 S. W. Rep. 4.

30. CONSTITUTIONAL LAW — Special Acts — Classification of Cities.—Incorporated cities, boroughs, towns, and villages, as well as townships, are recognized by the constitution as classes for legislation. Laws limited to either of such classes will not violate the constitutional prohibition of private, local, or special laws "regulating the internal affairs of towns and counties."—STATE v. TOWN OF GUTTENBERG, N. J., 44 Atl. Rep. 758.

31. CONTRACT—Approval—Agency.—A written contract provided that it was not valid until approved by written notice of acceptance by defendants, and was signed by plaintiff and by defendant's agent. The latter never notified defendants of such contract, and they received no notice thereof until about nine months afterwards, when they immediately repudiated and refused to approve it. Held, that no contract between the parties existed.—WHITMAN AGRICULTURAL CO. v. HORNBROOK, Ind., 55 N. E. Rep. 502.

32. CONTRACT—Interference with Performance.—One having a contract with a State, made pursuant to law, to supply for a term of years, all of certain text-books, adopted by act of the legislature, for use in the public schools of the State, may maintain an action for damages against a third person, who, with knowledge of the facts, induces the school book boards of counties to purchase books from him and discard those of the plaintiff.—HEATH v. AMER. BOOK CO., U. S. C. C., D. (W. Va.), 97 Fed. Rep. 533.

33. CONTRACTS—Proposition — Acceptance.—A proposition by a second mortgagee of land to the first mortgagee, to pay him the rents in consideration of his forbearing foreclosure, is sufficiently accepted to become a contract by an actual forbearance, and acceptance of rents, though the mortgagee did not agree, by express words, to forbear.—MARSHALL v. OLD, Colo., 59 Pac. Rep. 217.

34. CONTRACT—Subscription — Fraud — Avoidance.—Misrepresentations, inducing a subscription for a proposed college, that it was to be non-sectarian, and to be named after a certain person, are material, and sufficient to avoid the contract, though they relate to matters for future performance.—COLLINSON v. JEFFRIES, Tex., 54 S. W. Rep. 28.

35. COPYRIGHT — Suit for Infringement—Preliminary Injunction.—In a suit for infringement of a copyrighted directory by copying therefrom lists of names used by defendant in a rival publication, where the moving affidavits for a preliminary injunction make a strong showing of infringement, and defendant fails to furnish the testimony of the canvassers whose work is attacked, or the lists returned by them, he will be required to give security to respond for any damages which may ultimately be recovered against him; otherwise, an injunction will be awarded.—TROW DIRECTORY, ETC. CO. v. BOYD, U. S. C. C., S. D. (N. Y.), 97 Fed. Rep. 586.

36. CORPORATION — Estoppel.—Any failure or omission by a corporation to comply with the provisions of a statute, which falls short of justifying a direct proceeding by the State to forfeit its charter, is not fundamental; and third parties may, by their acts, be estopped from setting up such failure as a bar to the enforcement of their obligations to the corporation.—JACKSON v. CROWN POINT MIN. CO., Utah, 59 Pac. Rep. 238.

37. CORPORATION—Foreign Corporations — Change of Domestic Corporation.—Though a copy of the charter and by-laws of a foreign corporation be filed with the secretary of state, as provided by Laws 1899, ch. 62, for making it a domestic corporation, it does not become

such, this being done by its general counsel, without its knowledge or consent, his authority being limited to prosecuting and defending suits specially intrusted to him, and to payment of taxes and license fees; it having promptly disavowed his acts, and notified such secretary, and demanded return of the papers.—MUT. RESERVE FUND LIFE ASSN. v. THOMPSON, N. Car., 34 S. E. Rep. 537.

38. CRIMINAL EVIDENCE — Insanity — Non Experts—Opinion.—A non-expert witness, who was not present at a homicide, cannot express his opinion as to the sanity of the accused, based both on his previous knowledge of accused and hearsay knowledge of facts attending the homicide.—STATE v. PEEL, Mont., 59 Pac. Rep. 168.

39. CRIMINAL LAW—Affray—Evidence.—When the affray charged is the fighting of two or more persons in a public place, the public place need not be specified or proved.—STATE v. GRIFFIN, N. Car., 34 S. E. Rep. 513.

40. CRIMINAL LAW — County Commissioners — Illegal Claim.—Burns' Rev. St. 1894, § 7846, provides that the county commissioners shall examine the merits of all claims presented, and allow any claim in whole or in part, as they may find it to be just; and section 2105, declares that any officer under the constitution or laws of this State who fails to perform any duty prescribed by law shall, on conviction thereof, be fined. Held, that the latter section did not warrant a conviction of a member of a board of county commissioners charged with having knowingly voted to allow an illegal claim against the county.—STATE v. ROBERTSON, Ind., 55 N. E. Rep. 491.

41. CRIMINAL LAW—Forgery.—Under Ky. St. § 1185, providing for the punishment of any person who shall forge or counterfeit an order for the payment of money or other thing with intent to defraud another, the indictment need not allege that the acts were wilfully done, it being sufficient to follow the words of the statute.—ELDRIDGE v. COMMONWEALTH, Ky., 54 S. W. Rep. 7.

42. CRIMINAL LAW — Forgery — Venue.—Where one signs another's name to a note in one county, and fills up the blanks in another county, he is guilty of forgery therein, and the venue would be properly laid in the latter county.—STATE v. SPAYDE, Iowa, 80 N. W. Rep. 1058.

43. CRIMINAL LAW—Homicide — Insanity.—The burden is on accused to establish the defense of insanity by a fair preponderance of the evidence.—STATE v. ROBBINS, Iowa, 80 N. W. Rep. 1061.

44. CRIMINAL LAW—Rape — Corroboration.—While a conviction for rape may be properly had upon the uncorroborated testimony of a prosecutrix, this would only be warranted when the reputation of the prosecutrix for chastity and veracity is unimpeached, and when the facts and circumstances surrounding the commission of the offense are corroboration, and not contradictory of the statements of the prosecutrix.—STATE v. ANDERSON, Idaho, 59 Pac. Rep. 180.

45. CRIMINAL LAW—Seduction.—A charge that accused was guilty of seduction, if complainant submitted to sexual intercourse by reason of some promise or inducement made by him, without charging that such promise or inducement must have been false, and that complainant must have been deceived thereby, was erroneous.—STATE v. HAMANN, Iowa, 80 N. W. Rep. 1064.

46. CRIMINAL LIBEL — Privilege — Justification.—Where a libel published concerning a candidate for judge is circulated outside the judicial district, it is not privileged, and, on a criminal prosecution, accused's belief in its truth affords him no protection.—STATE v. HOSKINS, Iowa, 80 N. W. Rep. 1063.

47. DEATH BY WRONGFUL ACT — Damages.—In an action for wrongful death, special damages, because of the physical condition of the mother of plaintiff's intestate caused by his death, can be recovered, although no such damages were claimed in the declaration.—NORFOLK & W. RY. CO. v. STEVENS, Va., 34 S. E. Rep. 525.

48. DEBTOR AND CREDITOR — Composition with Creditors — Special Assessment.—There is no consummated agreement between a partnership and its creditors for a *pro rata* payment of its debts out of its assets where at a meeting of the parties there is merely a preliminary arrangement for the drafting and circulating of a written agreement, and this is only partially written up, and never signed.—DOLESE v. MCDOUGALL, Ill., 55 N. E. Rep. 547.

49. DEEDS—Contracts—Parol Evidence.—A warranty deed, reciting a consideration, and reserving possession and the rents and profits in the grantor for life, to be applied to his support and the support of his son, the grantee, and to the payment of a certain sum to each of his other children, and providing that the amounts remaining unpaid to such children at grantor's death should be paid by the grantee within 12 years thereafter, and that such sum should be a lien on the premises conveyed, is complete and unambiguous; and hence parol evidence is inadmissible to show a part of such agreement alleged not to have been reduced to writing.—MCENERY v. MCENERY, Iowa, 80 N. W. Rep. 1071.

50. DEED — Delivery.—An instruction that a deed is presumed to have been delivered on the day of its date is harmless, the uncontradicted evidence being that it was then delivered.—SMITH v. JAMES, Tex., 54 S. W. Rep. 41.

51. DEEDS — Execution — Attorney in Fact.—A deed, showing on its face that it is executed by the grantor as attorney in fact of the owners, but signed by the attorney's name only, conveys the title of his principals, under Shannon's Code, § 3679, providing that a deed may be executed by the attorney's simply sig ing his own name, if the instrument on its face shows the character in which the deed is intended to be executed.—MCCREARY v. MCCORKLE, Tenn., 54 S. W. Rep. 53.

52. DIVORCE — Custody of Children.—A judgment refusing to allow the wife alimony, and awarding to the husband the custody and nurture of the infant son of the marriage, may be modified in future, if the changed condition of the parties makes it proper and right; the action being filed away, with leave to reinstate without notice.—MANSFIELD v. MANSFIELD, Ky., 54 S. W. Rep. 16.

53. EJECTMENT — Failure to Show Title in Plaintiff.—Where the plaintiff in an action to recover real estate does not claim title from the same source as defendant, and fails to show title in himself or in those from whom he claims, either by grant or length of possession sufficient to authorize the presumption of a grant, or adverse possession, he should be nonsuited.—HODGE v. HODGE, S. Car., 34 S. E. Rep. 517.

54. EQUITABLE LIEN — Attachment — Replevin.—The equitable lien which complainant has on land, growing out of his parol purchase thereof, his part payment therefor, and refusal of defendant to convey it to him, is not lost in a suit to set aside the purchase, and recover the money paid, the same being accompanied by attachment of the land and other property by the giving of a replevin bond by defendant under Mill. & V. Code, § 4250; so that the chancellor, the complainant assenting, may, at the instance of the sureties, provide for exhaustion of such lien, before proceeding on the replevin bond.—CHRISENBERRY v. WYLIE, Tenn., 54 S. W. Rep. 49.

55. EVIDENCE — Parol Evidence — False Representations.—Parol evidence is admissible to show false representations inducing a written contract.—DAVIS v. DRISCOLL, Tex., 54 S. W. Rep. 43.

56. EVIDENCE—Parol Evidence—Varying Contract.—Though a note is under seal, importing a consideration, it is not varied or contradicted by parol evidence that it was not to be paid till collection of a certain other note given to the maker of the first note for pur-

chase money of land sold by the parties to said first note.—QUIN v. SEXTON, N. Car., 34 S. E. Rep. 542.

57. EVIDENCE — Reputation of Premises.—Evidence of the character of the inmates and frequenters of a house is admissible to show that it was being used for prostitution and assignation.—DEMARTINI v. ANDERSON, Cal., 59 Pac. Rep. 207.

58. EXECUTIONS — Right to Enjoin.—Where property was seized and sold by county treasurer's deputies under an assessment and levy, and actions of replevin by the owner against the purchasers resulted in judgments in their favor, the former owner cannot enjoin the sale of such property under execution on such judgments, though other actions are pending by him against the insolvent treasurer and his deputies for such seizure.—HALEY v. BREEZE, Colo., 59 Pac. Rep. 226.

59. FEDERAL COURTS—Federal Question.—The decision of a State court holding that by reason of their false assumption of corporate authority the officers, directors, and shareholders of what purported to be a national bank, but which never obtained legal authority to do business, became liable as partners, on the principle of agency, for contracts entered into in the name of the corporation, does not involve any federal question which will sustain a writ of error from the Supreme Court of the United States, but only a question of general law.—SEEBERGER v. MCCORMICK, U. S. S. C., 20 Sup. Ct. Rep. 128.

60. FEDERAL COURTS—Jurisdiction of Federal Courts —Federal Question.—A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of State taxations, is one which involves the construction and application of the provisions of the constitution of the United States prohibiting the taking of property without due process of law, and securing to all persons the equal protection of the laws, of which a federal court has jurisdiction, without regard to the citizenship of the parties.—SOUTHERN RY. CO. v. NORTH CAROLINA CORP. COMMISSION, U. S. C. C., E. D., (N. Car.), 97 Fed. Rep. 513.

61. FRAUDS, STATUTE OF—Lease of Real Estate.—As a parol agreement for the lease of real estate for a longer term than one year is not enforceable, no action for damages lies for refusing to reduce the agreement to writing.—HURLEY v. WOODSIDES, Ky., 54 S. W. Rep. 8.

62. GAMBLING CONTRACTS—Agreement to Repurchase Stock.—An agreement between the seller and buyer of railroad stock that after the expiration of a certain time, if the buyer is then willing, the seller will repurchase the stock at the price specified in the agreement of sale, makes the contract one of conditional sale, and not a gambling contract, within Cr. Code, § 180, inflicting a punishment on one who contracts to have or give to himself or another the option to buy or sell at a future time any stock of any railroad or other company, and declaring contracts made in violation thereof gambling contracts.—UBBEN v. BINNIAN, Ill., 55 N. E. Rep. 552.

63. GUARDIAN AND WARD—Liability of Agreement for Indulgence.—An agreement by the ward to give the guardian time to discharge his liability does not release the sureties in the guardian's bond.—DUFOUR v. DUFOUR, Ky., 54 S. W. Rep. 176.

64 HOMESTEAD—Exemptions—Tenant in Common—Occupancy—On title to house and lands vesting in plaintiff as tenant in common, occupancy is established by immediate entry and by staying in the house over nights, and taking his supper and breakfast there, though his wife and family remained on her farm; and plaintiff, by such occupancy, becomes entitled to homestead privileges.—LAWRENCE v. MORSE, Mich., 80 N. W. Rep. 1087.

65. INJUNCTION—Action at Law—Cancellation of Instruments.—Relator brought an action on a fraternal society's benefit certificate. Subsequently, the society filed a bill in the circuit court of another county to cancel the certificate on the ground that it was procured by fraud, and the latter court, sitting as a court of equity, enjoined the prosecution of the action at law pending the determination of the suit in equity. Held, that the circuit court of such other county, sitting in equity, had power, in its discretion, to issue such injunction, and that its action in so doing cannot be reviewed by the supreme court.—MACTAVISH v. ADSIT, Mich., 80 N. W. Rep. 1086.

66. INJUNCTION—Change to Joint Stock Company.—At the suit of a member of a mutual insurance company a preliminary injunction may be awarded to restrain the directors from changing the company into a joint stock company, when the company itself has not taken the proceedings prescribed by the insurance companies act.—GERMAN MUT. FIRE INS. CO. OF NEWARK, N. J., v. SCHWARZWAELDER, N. J., 44 Atl. Rep. 769.

67. INSURANCE—Insurable Interest.—Since partners transacting business as an unincorporated company and purchasing land in the company's name have an insurable interest in such property, where plaintiffs composed an unincorporated company, to which a deed conveying the property had been delivered, they had an insurable interest therein, and were its owners. —GRABBS v. FARMERS' MUT. FIRE INS. ASSN., N. Car., 34 S. E. Rep. 503.

68. INSURANCE—Parol Agreement to Renew.— A parol agreement to renew an existing policy of insurance when it should expire is valid, though no premium be tendered on the day when the renewal policy should issue, provided the course of dealing between the parties has been such as to justify the belief on the part of insured that credit is to be extended for the premium, and that he is to pay only on demand.—BALDWIN v. PHŒNIX INS. CO., Ky., 54 S. W. Rep. 13.

69. INSURANCE—Power of Agent.—Waiver of Conditions.—Where the general manager of an insurance company tells a broker that the company will issue policies on acceptable risks, and will allow him commissions thereon, and he procures many risks, and the manager causes policies to be issued on them, and allows him commissions, and the policies are delivered through him, he is such agent of the company as to have power to waive conditions in the policy, when, at his solicitation, one is induced to take out insurance in said company.—IMPROVED MATCH CO. v. MICHIGAN MUT. FIRE INS. CO., Mich., 80 N. W. Rep. 1068.

70. INSURANCE—Premium Note—Forfeiture of Policy. —A provision in an insurance premium note that, if it is not paid at maturity, the entire premium shall be considered earned, and the policy shall be null and void, so long as the note remains past due and unpaid, is valid and binding, and the policy is unenforceable if the note is not paid at maturity or prior to the loss.—NEW ZEALAND INS. CO. v. MAAZ, Colo., 59 Pac. Rep. 218.

71. INSURANCE—Proceeds — Equitable Lien.—The law will presume that insurance taken out by a mortgagor in his own name, after an agreement to insure for the mortgagee's benefit, was taken out, in pursuance of the agreement, for the mortgagee's benefit.—SWEARINGEN v. HARTFORD FIRE INS. CO., S. Car., 34 S. E. Rep. 449.

72. JUDGMENT — Injunction—Appeal.—Where a judgment was wrongfully recovered against a party in an action for malicious prosecution, and he was informed, shortly after the trial, of all the grounds which he urged in an independent action to procure a decree to enjoin its enforcement, but failed to take an appeal within the time prescribed, he was not entitled to such injunction, since negligence to take an appeal within the time prescribed is not a ground for equitable interference.—HOLLENBEAK v. MCCOY, Cal., 59 Pac. Rep. 201.

73. JUDGMENT—Mortgage—Lien.—Where a judgment debtor purchases land, and simultaneously with the receipt of the deed executes a mortgage to another person to secure a debt other than for the purchase money, such mortgage is subordinate to the judgment lien.—WEIL v. CASEY, N. Car., 34 S. E. Rep. 506.

74. JUDGMENT - Parties to Action.—Where a judgment giving plaintiffs a lien for their debt on defendant's remainder interest in land was allowed to lie dormant for 12 years, the action having in the meantime been filed away, plaintiffs were entitled to maintain an equitable action to enforce the judgment; Civ. Code Prac. § 439, providing for an equitable action to enforce a judgment only after execution has been returned, "No property," having application only to personal judgments.—RITCHEY v. BURICKE'S ADMRS., Ky., 54 S. W. Rep. 173.

75. JUDICIAL SALE—Lien Creditors.—Where land was sold to satisfy the claims of lien creditors, a creditor who bought several parcels cannot be allowed to discharge his bid therefor by the debt due to him, though the proceeds of the sale were otherwise sufficient to satisfy the claims of other creditors entitled to priority, where, without their fault, the receiver appointed to collect and disburse the same defaulted and died, and his estate and sureties are insolvent, but the preferred creditors are entitled to have the amount due from him on his bid collected, and distributed among them, if it is necessary to pay their claims, and he must bear the loss.—PATTERSON v. CRAWFORD, Va., 34 S. E. Rep. 458.

76. LIBEL — Facts not Constituting Defamation.—A published letter charging that plaintiff got up a raffle for the benefit of the writer without his consent; appointed a committee of a fraternal organization to manage it; said he had received no money from it; that some of the members of the organization had purchased tickets; that the intended beneficiary received nothing from it; and that the facts were published so that the members might get their money back,—is not libelous, as charging or imputing that plaintiff was guilty of falsehood, deceit, fraud, or misconduct as a member of said organization, or that he had obtained money by false pretenses, and had embezzled or misappropriated it.—BROWN v. BOYNTON, Mich., 80 N. W. Rep. 1099.

77. LIBEL — Privileged Communications.—A communication to be privileged, must be made upon a proper occasion, from a proper motive and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.—HEBNER v. GREAT NORTHERN RY. CO., Minn., 80 N. W. Rep. 1128.

78. LIFE INSURANCE—Deductions—Defenses.—Where the policy provides for the payment of a certain sum upon the death of the insured, less any "indebtedness due the company," no deduction can be made for "deferred premiums" which are neither due nor earned at the time of death.—NAT. LIFE ASSN. OF HARTFORD v. BERKELEY, Va., 34 S. E. Rep. 470.

79. MALICIOUS PROSECUTION — Original Action.—Where, in an action for malicious prosecution, in causing plaintiff's arrest for embezzlement, defendant pleaded that there was no trial of such charge, because plaintiff prevailed on defendant to drop the matter, such allegation raised an important issue, which was properly submitted to the jury, on which their affirmative finding was conclusive of the action, since a discontinuance of the prosecution at plaintiff's request precluded his recovery.—WELCH v. CHEEK, N. Car., 34 S. E. Rep. 531.

80. MANDAMUS — County Board.—*Mandamus* will not lie to compel a county treasurer to repay to a town school district money, belonging to it, erroneously paid over to the county treasurer by the town treasurer, since such money is then in possession of the county under an implied agreement to repay it, and the treasurer has no authority and is under no duty to do so without authorization by vote of the county board, and since the district has an adequate remedy by presenting its claim to the county board, and, if denied, by appeal therefrom.—STATE v. JOHNSON, Wis., 80 N. W. Rep. 1105.

81. MARRIAGE — Evidence — Reputation.—If persons live together ostensibly as man and wife, and are received in society as such, the law will, in favor of morality and decency, presume that they have been legally married; but cohabitation and repute alone do not constitute marriage, but are only evidence raising a presumption thereof, which may be overcome like other presumptions of fact.—ELDRED v. ELDRED, Va., 34 S. E. Rep. 477.

82. MARRIED WOMAN—Indorsement of Note.—Where a married woman indorses a note belonging to her, and her husband deposits it with a bank as collateral for his overdrafts, this, if considered as an attempt to charge her separate estate, being for his benefit alone, and without his written assent, is void.—WALTON v. BRISTOL, N. Car., 34 S. E. Rep. 544.

83. MASTER AND SERVANT—Fellow-Servants—Who Are—Employees of Railroad Company.—In an action against a railroad company for personal injuries, it appeared that at the time of the injury plaintiff was fireman on a passenger train which collided with a freight train at a certain station by reason of the turning of a switch the wrong way by a brakeman on the freight train. It was the regular duty of said brakeman, at the station in question, to turn the switch to enable the two trains to pass. Held, that plaintiff and the brakeman were fellow-servants, and plaintiff could not recover.—SWISHER v. ILLINOIS CENT. R. CO., Ill., 55 N. E. Rep. 555.

84. MASTER AND SERVANT — Injury — Negligence.—Where the complaint of an employee for injury from a piece of hammer breaking off and hitting him charges negligence generally, and then specific negligence in that the hammer was old and cracked, there can be no recovery on evidence that the hammer was new, and not cracked, but too highly tempered.—DE LA VERGNE REFRIGERATING MACH. CO. v. STAHL, Tex., 54 S. W. Rep. 41.

85. MASTER AND SERVANT—Safe Appliances—Negligence.—Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability for personal injuries sustained by an employee by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a coservant of the person injured.—PORT BLAKELY MILL CO. v. GARRETT, U. S. C. C. of App., Ninth Circuit, 97 Fed. Rep. 527.

86. MORTGAGE—Payment—Discharge of Mortgagor.—A purchaser of realty assumed the payment of a mortgage against it, which he afterwards paid with borrowed money, for which he gave his note with sureties. On payment he had the mortgage assigned, without consent of the mortgagors, as security for the note. One of the sureties, having paid a balance on the note, sought to hold the mortgage under the assignment. Held that, as the payment by the purchaser to the holder of the mortgage fully discharged it, the mortgagors, who, on the purchase, became sureties for its payment, were released from further liability.—COOK v. BERRY, Penn., 44 Atl. Rep. 771.

87. MORTGAGE—Reinstatement — Mistake.—B took a mortgage on property of M, it being agreed by all parties that it should have priority over an earlier mortgage to C. Thereafter M, being unable to pay, made a warranty deed of the property to B, which executed a release of the mortgage. C had no knowledge of this, and M made no representations as to C's mortgage. The facts in regard to C's mortgage were known to B,

but were overlooked by it at the time of taking the deed; and its officers and agents having the transaction immediately in charge were not informed as to such mortgage, and overlooked it. Held, that B's mortgage could not be reinstated on the ground of mistake.—CUMBERLAND BLDG. & LOAN ASSN. v. MCMULLEN, Tenn., 54 S. W. Rep. 63.

88. MUNICIPAL CORPORATION—Defective Sidewalk—Contributory Negligence.—In an action for personal injuries to plaintiff's wife, a complaint stating that she, without knowledge of the dangerous condition of a sidewalk, was walking thereon, using all precautions and doing everything possible to learn its condition, and while looking at the same it gave away, and she was injured, is not demurrable, as showing contributory negligence. In an action for personal injuries, it was error to allow a physician to testify to the amount he had charged plaintiff for medical services, when but a small amount of the bill had been paid, and there was no other testimony concerning the value of services.—CITY OF BEDFORD v. WOODY, Ind., 55 N. E. Rep. 499.

89. MUNICIPAL CORPORATION—Conviction under Ordinance.—A city is not liable to one for injury to his reputation by reason of his arrest, conviction, and imprisonment under an ordinance defining and punishing "suspicious characters," though it be void; as the city is, in such matter acting in a governmental capacity, and attempting to exercise police powers.—MCFADIN v. CITY OF SAN ANTONIO, Tex., 54 S. W. Rep. 48.

90. MUNICIPAL CORPORATIONS — Railroads—Use of Streets.—Where a city granted a railroad the privilege to lay tracks in a street pursuant to a statute permitting it to do so, on petition of property owners, the city's power was limited by the petition, and it could not extend the duration of the privilege beyond that specified in the petition.—CITY OF CHESTER v. WABASH, ETC. R. CO., Ill., 55 N. E. Rep. 524.

91. MUNICIPAL CORPORATIONS—Streets.—A city is not obliged to signify its acceptance of a dedication of a street until it is required for use. Acceptance is in time, if made before the offer to dedicate is withdrawn. —CITY OF ASHLAND v. CHICAGO, ETC. RY. CO., Wis., 80 N. W. Rep. 1101.

92. NEGLIGENCE—Injuries to Servant—Damages.—In an action for personal injuries to a servant, mental as well as physical suffering may be taken into consideration in determining the damages to be allowed.—NORFOLK & W. R. CO. v. MARPOLE, Va., 34 S. E. Rep. 462.

93. NUISANCES—Damages.—Injury from dumping garbage on land not being permanent, the measure of damages is the difference in the rental value with and without the nuisance, with such incidental items as the cost of taking care of the premises when not rented, because of the nuisance and the cost of removing the nuisance —CITY OF SAN ANTONIO v. MACKEY'S ESTATE, Tex., 54 S. W. Rep. 33.

94. OFFICERS—Sheriff Elect—Death.—Where a sheriff-elect died before qualifying or receiving a certificate of election, but after the expiration of the term of the sheriff in office, though the sheriff elect was never in office, his death creates a vacancy, within the meaning of Const. art. 5, § 23, providing that vacancies in the office of sheriff shall be filled by the commissioners' court; and the appointment of plaintiff to fill such vacancy was a proper exercise of such constitutional power.—MADDOX v. YORK, Tex., 54 S. W. Rep. 24.

95. PARTNERSHIPS—Interest—Accounting Between.—In an action for an accounting between partners, defendant should not be charged with interest on the firm funds in his possession from the filing of the bill until the entry of the decree, where many years elapsed between these two dates solely through the fault of plaintiff, who also neglected to demand an accounting before suit brought.—SNELL v. TAYLOR, Ill., 55 N. E. Rep. 545.

96. PATENTS—Invention.—The mere carrying forward and application of old ideas so as to secure a better result, by substituting newer and better materials for those previously used, does not involve invention which will sustain a patent.—PLASTIC FIREPROOF CONSTRUCTION CO. v. CITY AND COUNTY OF SAN FRANCISCO, U. S. C. C., N. D. (Cal.), 97 Fed. Rep. 620.

97. PLEADING—Complaint — Implied Contracts.—Under Prac. Act, §§ 1, 9, requiring a complaint merely to state "a plain and concise statement of the material facts" requisite to show plaintiff entitled to the relief demanded, in an action on an implied contract to pay for services judgment will not be arrested because the complaint failed to allege that the debt remained unpaid at the commencement of the action.—MORRHOUSE v. THROCKMORTON, Conn., 44 Atl. Rep. 747.

98. PLEADING—Demurrer.—Where defendant pleaded failure of consideration to an action on notes given for goods sold by plaintiff with a warranty, and plaintiff demurred to the plea, stating the warranty attached to the plea was conditional, and that the plea did not show performance of the conditions, the record not supporting this statement, no warranty being in fact attached to the plea, the demurrer was properly overruled.—CUMBERLAND NURSERY CO. v. SUDBERRY, Tex., 54 S. W. Rep. 27.

99. PROCESS—Service—Vacating.—An officer's return of service cannot be impeached by means of equivocal and evasive affidavits; and, to set aside and vacate a judgment on the ground that such a return is false, the proof of its untruthfulness must be positive, satisfactory, and convincing.—OSMAN v. WISTED, Minn., 80 N. W. Rep. 1127.

100. PROHIBITION—Contempt Proceedings.—A writ of prohibition will not be granted to restrain contempt proceedings in an inferior court, based on an alleged violation of an injunction, where the party applying for the writ has an adequate remedy by a motion to dissolve the injunction.—TOOMEY v. COMLEY, Conn., 44 Atl. Rep. 741.

101. RAILROAD COMPANY—Accident at Crossing.—In an action to recover for death of plaintiff's child, killed at a railway crossing, it is not sufficient to aver, by way of recital, that defendant was running its train through the city faster than four miles an hour, in violation of an ordinance some eight years before; but it must be directly averred that an ordinance was in force, and that it limited the speed of trains to four miles, and that the particular train was running beyond such rate.—LAKE ERIE & W. R. CO. v. MIKESELL, Ind., 55 N. E. Rep. 488.

102. RAILROAD COMPANY—Injury from Operation over Street—Limitation of Action.—Where plaintiff complains of noises, jars, smoke, and cinders, without any averment that these things were unnecessary in the prudent operation of the road, the action will be regarded as one for damages resulting from the prudent operation of the road.—ROWLSTONE v. CHESAPEAKE & O. RY. CO., Ky., 54 S. W. Rep. 2.

103. RAILROAD COMPANY—Injury at Railway Crossing —Pleading—Contributory Negligence.—While a railway company is negligent in failing to give the statutory signals on approaching a crossing and in running its train through a city at a speed beyond the limit fixed by ordinance, such negligence will not render the company liable for injuries, where the special findings show that such negligence was not the proximate cause of the injury, but plaintiff's team was frightened by the headlight of the engine, plaintiff knowing of the approach of the train.—BALTIMORE & O. S. W. RY. CO. v. MUSGRAVE, Ind., 55 N. E. Rep. 496.

104. RECEIVER—Action.—A receiver directed to collect purchase money due for land whose sale had been confirmed cannot, under such authority, sue to set aside a fraudulent conveyance of other land made by the purchase money debtors in order to subject it to the payment of the debt which he is ordered to collect.—MCALLISTER v. HARMAN, Va., 34 S. E. Rep. 474.

105. REPLEVIN—Sale to Insolvents.—If goods are obtained by fraud by a buyer from a seller, the latter may

rescind the sale, and replevy the same from the buyer, or one in possession as trustee for him, without demand before beginning action.—WEST v. GRAFF, Ind., 55 N. E. Rep. 506.

106. SALE—Conditional Sale—Chattel Mortgages.—An application by an insolvent debtor for a loan, to be secured on a stock of bicycles, was refused; but the negotiations resulted in his giving an absolute bill of sale on the stock, whereupon the vendee gave the debtor an option to purchase the stock within a limited time. The consideration for the bill of sale was paid, and the stock delivered to, and possession retained by, the vendee, except a few wheels, which he intrusted to the debtor to sell on commission. The debtor surrendered the option before its expiration, for a valuable consideration, and the vendee sold the stock at retail, realizing a large profit. Held, that the transaction was a conditional sale, and not a mortgage.—A. G. SPALDING & BRO. v. BROWN, Oreg., 59 Pac. Rep. 185.

107. STATUTES, Title of — Examination of Coal Mine Managers—Right of Action. — The title of Act June 18, 1891, to provide for the examination of mine managers, and to regulate their employment, does not cover a provision in section 5, giving a right of action, regardless of any question of negligence, for the death or injury of any miner employed in any mine where the mine manager has no certificate of competency of service, as required by the preceding sections of the act; and hence this provision is void, under Const. art. 4, § 13, which restricts statutes to one subject, which shall be expressed in the title.—WOODRUFF v. KELLYVILLE COAL CO., Ill., 55 N. E. Rep. 550.

108. TAXATION—Increase of Assessment Without Notice.—Under Ky. St. § 4053, providing that, if the value fixed by the assessor be greater than that fixed by the taxpayer, it shall be the duty of the assessor to notify the taxpayer at the time of the assessment, and to report to the board of supervisors a list of all taxpayers whose lists have been increased, an assessment is void to the extent that it is increased without such notice to the taxpayer and report to the board of supervisors.—NEGLEY v. HENDESON BRIDGE CO., Ky., 54 S. W. Rep. 171.

109. TAXATION—Franchise Tax.—An injunction will not be granted against the collection of a franchise tax from a foreign corporation, where there is nothing to indicate inability of the corporation to pay the tax, or of the defendant to respond in judgment if the tax be found to have been illegally exacted, and no special circumstances are set up justifying the exercise of equity jurisdiction, other than consequences which the complainant can easily avert without loss or injury by paying the tax, although the validity of the law might be more conveniently tested by the party denying it by bill in equity than by action at law.—ARKANSAS BUILDING & LOAN ASSN. V. J. W. MADDEN, U. S. S. C., 20 Sup. Ct. Rep. 119.

110. TAXATION—Recovery of Taxes—Payment Under Mistake of Law.—When a receiver of a bank pays taxes assessed against it, believing that the taxes were properly assessed against the bank instead of against the stockholders, he is bound by such act, whether it was right or wrong, as it was money paid under mistake of law, and cannot be recovered.—BRISTOL v. TOWN OF MORGANTOWN, N. Car., 34 S. E. Rep. 512.

111. TRESPASS—Pleading—Demurrer.—One may maintain trespass for injury to his possession, only when he is in the actual possession and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. He may also maintain an action in the nature of trespass on the case where he alleges that he owns the legal title, and further sets out such a state of facts as will show that the injury is an injury to the real estate.—CASEY v. MASON, Okla., 59 Pac. Rep. 252.

112. TRESPASS—Pleading — License.—Where plaintiff had brought trespass against defendant, who had entered on a strip of land extending along the boundary line between their lands, claiming such strip as his own, a plea of license admits plaintiff's possession and defendant's entry, and leaves only the issue of consent.—RAGAIN v. STOUT, Ill., 55 N. E. Rep. 529.

113. TRUSTS—Statute of Frauds — Res Judicata.—A husband promised deceased, on her deathbed, that he would procure the title of her land, from her heirs, for his wife. He procured conveyances to his wife from several of the heirs, but, owing to impracticability of securing it from all, it was arranged that the land should be sold under a mortgage, and he should buy it in for his wife. The sale was had, and he bid off the property in the name of his wife (saying he was buying for her), at the face of the debt, which was much less than its value, but had the trustee execute the deed to himself. He afterwards secured a conveyance from some of the other heirs to his wife. Held, that an express trust was created in his wife's favor, which was not within the statute of frauds, which does not contain the section of the English statute prohibiting creation of express trusts in land by parol.—THOMPSON v. THOMPSON, Tenn., 54 S. W. Rep. 145.

114. TRUSTS — Wrongful Conveyance.—Where deeds conveying trust property to the trustee through a third person were declared void as against the *cestui que trust*, she was not entitled, in an action against the trustee's executor, to which the trustee's heirs were not made parties, to a decree directing the executor to convey the property to a new trustee, since, on the trustee's death, title to the property passed to his heirs.—NEWMAN v. NEWMAN, Mo., 54 S. W. Rep. 19.

115. VENDOR AND PURCHASER — Contract.—Plaintiff, who had an option on timber land, offered to sell to defendant for a fixed price. Defendant asked plaintiff to get his option extended until an estimator could be sent to inspect the timber, and requested plaintiff not to offer the land to any one else in the meantime, to which plaintiff agreed. Held, that there was no contract which obligated defendant to purchase the land.—SEYMOUR v. CANFIELD, Mich., 80 N. W. Rep. 1096.

116. WATERS—Surface Waters — Diversion.—One cannot divert water to a stream, though he turns in another direction as much water, which would naturally have flowed into the stream, where that still flowing into it exceeds its capacity.—MIZELL v. MCGOWAN, N. Car., 34 S. E. Rep. 538.

117. WILLS — Conditional Estates.—A testatrix gave all her estate to her brothers and sisters, providing that, should any die "previous to the probating or execution" of her will, the share of the decedent should go to his or her surviving children. Held that, unless a brother or sister lived until testatrix's estate was settled and distributed, he or she took nothing under the will.—LAMB'S ESTATE v. HALL, Mich., 80 N. W. Rep. 1081.

118. WILLS—Disposition of Property.—Where certain provisions of a will constitute a general scheme for the disposition of testator's property to a class of beneficiaries, and one is void as a perpetuity, such provision invalidates the others connected with it, though, standing alone, they would be valid.—ELDRED v. MEEK, Ill., 55 N. E. Rep. 536.

119. WILLS—Evidence — Destroyed Will.—It is not sufficient, in a suit to restore a will destroyed by the testator, to show that it may have been in existence after the time his mind became so impaired that he could not revoke it, but it must appear that it was actually in existence after that time.—SHACKLETT v. ROLLER, Va., 34 S. E. Rep. 492.

120. WILLS—Execution—Witnesses.—In the execution of a will, it is not necessary, in the absence of statutory requirement, for the testator to request the witnesses to sign. Such request may be made by any person, so long as the testator acquiesces or approves it, or by his conduct such acquiescence or approval can be implied.—BURNEY v. ALLEN, N. Car., 34 S. E. Rep. 500.